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FILED

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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 505

MALONE FREIGHT LINES, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action no. 6041

MALONE FREIGHT LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION,
Appellees

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT OR DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, Paragraph 1, the above appellant files this its statement showing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment and decree appealed from herein, as follows:

I

The provisions of the statutes believed to sustain the appellate jurisdiction are as follows:

By Section 1253 of Title 28 of the United States Code, it is provided:

> "Sec. 1253. *Direct appeals from decisions of three-judge courts.*
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court, an order granting

or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a District Court of three judges."

By Section 1336 of Title 28 of the United States Code, it is provided:

"Sec. 1336. *Interstate Commerce Commission orders.* Except as otherwise provided by act of Congress, the District Court shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

By Section 2321 of Title 28 of the United States Code, it is provided:

"Sec. 2321. *Procedure generally; process.* The procedure in the District Courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter." (Chapter 157, Title 28, U. S. Code).

And by Section 2325 of Title 28 of the United States Code, it is provided:

"Sec. 2325. *Injunction, three-judge court required.* An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a District Court of three judges under Section 2284 of this Title."

II

The judgment and decree appealed from was entered on the 13th day of October, 1952, and the application for appeal is presented on the 27th day of October, 1952.

III

This action was brought to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission (hereinafter called Commission), issued on August 23, 1951, in a case before that Commission entitled *Akers Motor Lines, Inc., et al.* v. *Malone Freight Lines, Inc.*, Docket No. MC-C-1132, requiring Malone Freight Lines, Inc., to cease and desist, on or before October 15, 1951, from all operations in interstate or foreign commerce of the character found by said Commission in said proceeding to be unlawful and beyond the scope of authority theretofore granted to Malone Freight Lines, Inc. by said Commission as evidenced by a Certificate of Public Convenience and Necessity dated January 31, 1950, in Docket No. MC- 75840.

The order was issued at the conclusion of an investigation conducted by the Commission following receipt of a formal complaint from Akers Motor Lines, Inc. and certain other motor carriers under Title 49, Sec. 304, U. S. Code (Interstate Commerce Act, Part II, Sec. 204) in which it was alleged that Malone Freight Lines, Inc. was operating illegally and in violation of Title 49, Sec. 306(a), U. S. Code (Interstate Commerce Act, Part II, Sec. 206(a), in that Malone was exceeding the authority granted to it in its certificate from the Commission. Throughout the proceedings before the Commission, appellant denied that it had been or was operating in excess of that authority.

Appellant sought reconsideration by the entire Commission and oral argument which requests were denied. It has exhausted all administrative remedies provided by Part II of the Interstate Commerce Act (Title 49, U. S. Code, Chapter 8), of which the above referred sections are a part, before instituting its action in the three-judge District Court for the Northern District of Alabama, Southern Division.

By Section 205(g) of the Interstate Commerce Act (Title 49, U. S. Code, Section 305(g), it is provided:

> "Any final order made under this Chapter shall be subject to the same right of relief in Court by any party in interest as is now provided in respect to orders of the Commission made under Chapter I of this Title, *provided* that where the Commission, in respect of any matter arising under this Chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under Section 2284 of Title 28, and such Court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

By Section 205(h) of the Interstate Commerce Act (Title 49, U. S. Code, Section 305(h), it provided:

> "All the provisions of Section 17 of this Title shall apply to all proceedings under this Chapter."

Section 17(9) of the Interstate Commerce Act, Part I, (49 U. S. Code, Section 17(9)), provides:

> "When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a Board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a Court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Pursuant to the foregoing Sections of Title 49, and to Sections 1336, 2281-2284, and 2321-2325 of Title 28, United States Code, this action was brought to set aside and enjoin the enforcement of the aforesaid order of the Commission in its Docket MC-C-1132 after all administrative remedies had been exhausted. The matter was heard by a three-judge District Court.

The decree and judgment of the three-judge District Court bearing the date of October 13, 1952 approved the order the Commission issued on August 23, 1951, in Docket No. MC-C-1132 and denied appellant's application to set it aside and enjoin its enforcement.

IV

Cases relied upon and believed to sustain the jurisdiction of the Supreme Court are as follows:

U. S. v. *Hancock Truck Lines*, 1945, 65 S. Ct. 1003, 324 U. S. 774, 89 L. Ed. 1357;

U. S. v. *Capitol Transit Company*, 325 U. S. 357;

U. S. v. *Detroit and Cleveland Navigation Company*, 326 U. S. 326; and

U. S. v. *Pierce Auto Freight Lines*, 327 U. S. 515.

V

The Issue

The question for decision is whether or not Malone Freight Lines, Inc. has been or is now operating in excess of the authority set forth in its Certificate of Public Convenience and Necessity of January 31, 1950, issued to it by the Interstate Commerce Commission in Docket No. MC-75840, and whether, as a matter of law, operations as con-

ducted are authorized by the Certificate. We need consider only two portions of the certificate which read as follows:

(A) REGULAR ROUTES:

(Commodity description omitted since it is not in dispute.)

Between Anniston, Ala., and Opelika, Ala.:

From Anniston over U. S. Highway 78 via Oxford, Ala., to junction Alabama Highway 37, thence over Alabama Highway 37 via Roanoke and Lafayette, Ala., to Opelika (also from Junction U. S. Highway 78 and Alabama Highway 37 over U. S. Highway 78 to Heflin, Ala., thence over Alabama Highway 9 to junction Alabama Highway 37; also from Lafayette over Alabama Highway 50 to Lanett, Ala., thence over U. S. Highway 29 to Opelika); and return over these routes.

Service is authorized to and from the intermediate point of Heflin, Ala., restricted to shipments of 2,000 pounds or more; to and from all other intermediate points without restriction; and to and from the off-route point of West Point, Ga."

* * * * * * *

(B) IRREGULAR ROUTES:

(Commodity description omitted since it is not in dispute.)

"Between Montgomery, Ala., and points and places in Alabama within 65 miles of Birmingham, Ala., including Birmingham, on the one hand, and, on the other, Trenton, N. J., Philadelphia, Pa., New Orleans, Gretna, and Destrahan, La., New York, N. Y., Winchester and Suffolk, Va., Wheeling, W. Va., Points and places in that part of Georgia north of U. S. Highway 80, those in that part of Tennessee on and east of U. S. Highway 27, and those in Mississippi, North Carolina, and South Carolina."

* * * * * * *

"Carrier may combine two or more of the above irregular route authorities provided the authorities have a point common to both to which the carrier may transport a given commodity under one authority and from which it may transport the same commodity under the other and establish through service under such combination provided in each instance the commodity is transported through the common or gateway point, *and provided further that this certificate does not contain any restriction or other indication that through service shall not be conducted.*" (Emphasis added.)

Appellant's irregular route authority set out under (B) above was acquired by it from Howard Hall Company, Inc., on March 27, 1945, with the approval of the Commission, Division 4, as reported in Motor Carrier Cases, Volume 40, Page 161, et seq. For the major portion of the operating rights of Howard Hall Company, Inc., vendor, appellant paid in excess of $125,000.00. With respect to the unification of the acquired rights with those already possessed by Malone Freight Lines, Inc., or those it might afterwards own, the Commission said: (Page 170)

"In conducting future *regular-route and irregular-route operations* pursuant to the unified rights, vendee will be expected to observe the scope of such rights by moving traffic only through authorized common points as gateways in accordance with the principle in *B. & E. Transp. Co., Inc.—Purchase—Merchants Transp., Inc.*, 36 M.C.C. 561 and cases cited therein; and to preserve the separate nature of its *regular-route and irregular-route operations. Thurston—Purchase—Merritt*, 15 M.C.C. 358 . . ." (Emphasis added.)

and:

"We find that purchase by Malone Freight Lines, Inc. of certain previously described operating rights and property of Howard Hall Company, Inc. . . . will be consistent with the public interest, and that, if the

transaction is consummated, Malone Freight Lines, Inc. will be entitled to a certificate covering the above-described portions of operating rights granted Howard Hall Company, Inc. in the 'grandfather' case, supra, *which rights are herein authorized to be unified with rights otherwise confirmed in Malone Freight Lines, Inc.*, with duplications eliminated." (Emphasis added.)

On December 19, 1947, in the case of *Alabama Mineral Land Co., et al—Control; Malone Freight Lines, Inc.—Purchase — (Portion) — North Alabama Motor Express*, Docket No. MC-F-3488, (not officially reported), Division 4 of the Commission authorized the transfer of the regular route rights set out under (A) above from North Alabama Motor Express, Inc. to Malone Freight Lines, Inc. for a consideration of $2,500.00. The Commission specifically provided that the rights Malone was authorized to acquire from North Alabama Motor Express, Inc. might lawfully be unified with rights otherwise confirmed in the appellant. Division 4 in its granting paragraph in Docket No. MC-F-3488, said:

"We find that purchase by Malone Freight Lines, Inc. of the previously described portion of the operating rights of North Alabama Motor Express, Inc. . . . upon the terms and conditions as set forth above . . . will be consistent with the public interest and that if the purchase is consummated, Malone Freight Lines will be entitled to a certificate covering the aforesaid rights granted in MC-70560 and MC-70560 (Sub 1) . . . *which rights are herein authorized to be unified with rights otherwise confirmed in it* . . ." (Emphasis added.)

What Malone Freight Lines, Inc. has been doing is this: It, for example, originates a shipment at LaGrange, a point in Georgia north of U. S. Highway 80, takes it to Hollis School or Oxford, Alabama, which points are on its regular

route and within 65 miles of Birmingham, which regular-route authority was acquired from North Alabama Motor Express and is set forth in detail under (A) above; thence it moves the shipment over U. S. Highway 78 (under its regular-route authority) to Heflin, Alabama; and from Heflin to Philadelphia, Pennsylvania, or to some other destination point in the authority acquired from Howard Hall Company, Inc., as set forth in (B) above. On the return movement, freight originating at Trenton, New Jersey, for example, and destined to Atlanta, Georgia, is transported to Anniston or Oxford, Alabama, under the authority acquired from Hall and set forth in (B) above; thence over the regular route acquired from Alabama Motor Express (set forth under (A) above) to Heflin, Alabama; and from thence under the irregular-route authority acquired from Howard Hall Company, Inc. (set forth under (B) above) to Atlanta, Georgia.

The Commission, by Division 5, ruled that Malone was performing transportation services between points within a single radial destination territory not authorized by its Certificate of Public Convenience and Necessity and in violation of Title 49, Section 306(a), U. S. Code (Interstate Commerce Act, Part II, Section 206(a).

Appellant contends that the Commission has entirely ignored the fact in every instance the freight moves over the regular route acquired from Alabama Motor Express, Inc. and that Two *authorities are always involved, which authorities Malone acquired from* Two *separate sources, at* Two *different times, in separate proceedings, both approved by the Commission* WITH SPECIAL PROVISION FOR JOINDER OF ROUTES.

The decision of the Commission fails to give any credence to the use of regular-route authority, and the use of two separate grants; and there has been a total failure by the

Commission to comply with the provisions of the Administrative Procedure Act, (Title 5, U. S. Code, Sections 1001, et seq.) and particularly Section 1007(b) thereof.

At the time the acquisition of the regular-route from North Alabama Motor Express, Inc. in the Commission's Docket MC-F-3488 was under consideration, the president of Malone Freight Lines, Inc. testified before an examiner of the Commission that his company intended, if the acquisition was permitted, to use rights set forth under (A) and (B) above in combination with respect to traffic originating in Georgia, and also on traffic originating on the regular route destined to points in the east, as well as in connection with traffic originating in Georgia destined to another point in Georgia. He explained that the traffic would be handled on the irregular-route authority from a Georgia point to the regular-route, thence along the regular-route to a gateway, and thence back again on the irregular-route authority to another point in Georgia.

Following consummation of its purchase of the regular-route authority set forth in (A) above, appellant began regularly transporting property from points and places in Georgia north of U. S. Highway 80 to such points as New York, New York, Philadelphia, Pennsylvania and other eastern destinations set forth in its authority described in (B) above, such operations being conducted openly and in the belief that Malone Freight Lines, Inc. might lawfully so do.

The Commission has said that the operations conducted under the purchase of authority from Howard Hall Company are "irregular-route radial". In its decision entitled "Classification of Motor Carriers of Property", 2 M.C.C. 703, 709 irregular-route "radial" and "non-radial" are defined as follows:

> "Irregular-route radial service—An irregular-route radial-service carrier is any person who or which under-

takes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes from a fixed base point or points to points or places located within such radial area as shall have been fixed and authorized by the Interstate Commerce Commission in a certificate of public convenience and necessity, or permit, or *from any point* located within such radial area to such carrier's fixed base point or points.

Irregular-route non-radial service—An irregular-route non-radial-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes *between* points or communities located within such general territory as shall have been defined geographically and authorized in a certificate of public convenience and necessity, or permit, and any other points or communities located within the same general territory without respect to a hub community or a fixed base point of operation." (Emphasis added).

The principal difference between the two types of operation stems from the inclusion of the word "*from*" in the *radial* definition and the word "*between*" in the *non-radial* definition. A careful study of the rights secured from Howard Hall Company, Inc., discloses that the operating rights are "*between*" the areas described rather than "*from*" those areas. Thus it would seem that the irregular-route authority involved is definitely "*non-radial*" rather than "*radial*".

The rule laid down by the Commission itself in the decision to which we have referred is simply that any route may be tacked *irrespective* of its nature or type providing:

(a) There is a common point (where joinder occurs).
(b) That the "nature" of the type of rights joined be "preserved".

(c) That the Commission has not specifically restricted the right to "tack" or "join".

In the instant case it will be noted that the Commission *has specifically authorized and provided for the joinder.* Further, it will be noted that common points are present and that the record shows without contradiction that the "separate nature" of the types of service are being preserved in the joinder of the irregular and regular route service.

The Commission has consistently held that *any combination* of regular, irregular, radial, non-radial, and general commodity, specific commodity or alternate routes may be tacked or joined together in the absence of any restriction against such joinder. This consistent holding is contained in the following Commission decisions:

Kansas City, Kaw Valley Railroad, Inc.—Ext.—Lawrence, 49 M.C.C. 836;

Powell Bros. Truck Lines, Inc., 39 M.C.C., 11;

Cox Transp. Co.—Purchase—Moore Flesher Hauling Co., 36 M.C.C. 515, 518;

Black Motor Lines, Inc.—Purchase—Shamburger, 37 M.C.C. 787, 789;

Northern Transport Co., Extension—Blair Junction—Carrara, 41 M.C.C. 729, 732;

Garrett Freight Lines, Inc., vs. Northern Transp. Co., 47 M.C.C. 707, 709;

Aetna Freight Lines, Inc., Interpretation of Certificate, 48 M.C.C. 610;

Clendenning Motorways, Inc., Interpretation of Certificate, 49 M.C.C. 440;

Transport Corp. of Virginia Extension—Maryland, 43 M.C.C. 716;

We think it would serve no useful purpose to cite other decisions to the same effect representing a consistent policy by the Commission over a period of years.

Appellant is sincere in its claim that the order, if permitted to stand, will result in the revocation of the regular route purchased by it with the approval of the Commission from North Alabama Motor Express, Inc., in Docket No. MC-F-3488 without compliance with the provision of Title 49, Section 312, U. S. Code (Interstate Commerce Act, Part II, Section 212).

The order of the Commission results from its failure and refusal properly to interpret and apply Part II of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 8), as well as decisions of the Commission and the Courts rendered thereunder, and for the reason that the order arises from a wholly erroneous construction of that Act.

The order, if enforced, will result in Malone Freight Lines, Inc. being deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Enforcement of the order would mean that Malone Freight Lines, Inc. acquired nothing of value when it purchased the regular route involved from North Alabama Motor Express, Inc.

The order of the Commission of August 23, 1951 in Docket No. MC-C-1132, if enforced, would prevent Malone Freight Lines, Inc., owner of both the regular and irregular routes, from rendering all the services, and performing all the operations its vendors could have rendered and performed lawfully in combination, despite the fact that the Commission, in approving both acquisitions, specifically authorized joinder of the routes and authorities so acquired, for which appellant paid large sums of money. Furthermore, the Commission was informed at the time it considered the acquisition by Malone Freight Lines, Inc. of the regular

route purchased from North Alabama Motor Express, Inc., that the purchaser intended to join the authorities and operate in precisely the manner that the Commission has in its order of August 23, 1951 found to be unlawful. The Commission approved the proposed purchase even though it was informed at the time by means of testimony of the president of Malone Freight Lines, Inc. under oath before an examiner of the Commission, that the purchaser intended to combine the regular and irregular routes and operate precisely as it has been operating for the past four years and longer.

Enforcement of the order of the Commission of August 23, 1951 will force appellant to discontinue a major portion of its services in interstate commerce and will deprive it of traffic upon which it depends for its very existence. An investment of approximately one million dollars ($1,000,000.00) in equipment and properties for use in handling efficiently such traffic will be to a great extent lost or materially depreciated in value, and appellant will be forced immediately to release many of its trained personnel, and will suffer other damage. Additionally, shippers in a large area who have depended upon the service of appellant will be greatly inconvenienced and forced to seek other means for the transportation of their goods.

Counsel for appellant, after diligent search of the authorities, have been unable to find where many of the questions involved here have ever been presented to and decided by the Supreme Court of the United States. It is of importance to the motor carrier industry to have a decision on these questions. The Interstate Commerce Commission has approved scores, and even hundreds, of applications for the purchase of additional rights by motor carriers already in operation. Most of them acquired the additional rights for the purpose of joining them with authorities already

possessed by them. A decision in this case will enable purchasers in the future to have a much better idea of what additional authority they can lawfully acquire through purchase, particularly when there are regular and irregular routes involved as well as those authorities of a radial and non-radial character, and what the proper interpretation and application of the Interstate Commerce Act should be under the circumstances.

VI

Appellant attaches hereto a copy of the opinion of the three-judge court, dated October 13, 1952, together with a copy of the final decree of the same date dismissing the action by Malone Freight Lines, Inc., for an injunction, at the cost of the motor carrier.

Dated this the 27 day of October, 1952.

Respectfully submitted,

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APPENDIX

OPINION

Filed October 13, 1952

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Civil Action No. 6941

MALONE FREIGHT LINES, INC., *Plaintiff*,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Rives, Circuit Judge, and Kennamer and Lynne, District Judges; Lynne, District Judge

Plaintiff correctly invoked jurisdiction of this district court of three judges in this action to set aside a final order of the Interstate Commerce Commission.[1]

This case arose as a result of action taken by several motor common carriers [2] and interveners [3] who caused to be heard before the Interstate Commerce Commission the issue of whether or not Malone Freight Lines, Inc., was engaged in certain unlawful operations beyond the scope

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[1] 28 U. S. C. A. Sec. 1336, 1398, 2284, 2321-2325;
49 U. S. C. A. Sec. 17(9), Interstate Commerce Act, Part 1;
49 U. S. C. A. Sec. 305(h), Interstate Commerce Act, Part II, Sec. 205(h).

[2] Akers Motor Lines, Inc., Carolina Freight Carriers Corporation, Johnson Motor Lines, Inc., McLean Trucking Company, Inc., and Atlanta-New Orleans Motor Freight Company. These parties intervened as defendants in this action.

[3] Central of Georgia, Georgia & Florida, Louisville & Nashville, Nashville, Chattanooga & St. Louis, Seaboard Air Line, and Southern railroads.

of the authority granted in its certificate of public convenience and necessity.[4]

This certificate, No. MC-75840, January 31, 1950, provides, among other things, for two separate motor common carrier routes described here as a regular route and an irregular route, as follows:

> REGULAR ROUTES: * * *
>
> (Commodity description omitted since it is not in dispute.)
>
> Between Anniston, Ala., and Opelika, Ala.:
>
> From Anniston over U. S. Highway 78 via Oxford, Ala., to junction Alabama Highway 37, thence over Alabama Highway 37 via Roanoke and Lafayette, Ala., to Opelika (also from junction U. S. Highway 78 and Alabama Highway 37 over U. S. Highway 78 to Heflin, Ala., thence over Alabama Highway 9 to junction Alabama Highway 37; also from Lafayette over Alabama Highway 50 to Lanett, Ala., thence over U. S. Highway 29 to Opelika); and return over these routes. * * *

---

[4] This case is an outgrowth of a complaint filed in this court praying for injunctive relief from the alleged illegal conduct of Malone Freight Lines, Inc. The court sustained a motion to dismiss, holding that the primary jurisdiction doctrine was applicable in that the plaintiff had not exhausted its administrative remedies before the Interstate Commerce Commission. *Akers Motor Lines, Inc., et al.* v. *Malone Freight Lines, Inc.*, 88 F. Supp. 654. A hearing was then held May 9, 1950, before the Interstate Commerce Commission under provisions of 49 U. S. C. A. Sec. 304 (Interstate Commerce Act, Part II, Sec. 204). A recommended report and order requiring Malone Freight Lines to cease and desist from certain operations was filed by the examiner, Tobias Naftalin, August 7, 1950. Malone filed exceptions September 15, 1950, and complainants replied October 12, 1950.

The report and order complained of herein of the Interstate Commerce Commission, Division 5, was entered August 23, 1951, in accord with the recommendations of the examiner. Malone filed a petition for reconsideration November 13, 1951, which was denied February 12, 1952. The effective date of the order of Division 5 of August 23, 1951, has been extended to November 1, 1952. The action in this court was filed April 9, 1952.

IRREGULAR ROUTES • • •

(Commodity description omitted since it is not in dispute.)

Between Montgomery, Ala., and points and places in Alabama within 65 miles of Birmingham, Alabama, including Birmingham, on the one hand, and, on the other, Trenton, N. J., Philadelphia, Pa., New Orleans, Gretna, and Destrahan, La., New York, N. Y., Winchester and Suffolk, Va., Wheeling, W. Va., points and places in that part of Georgia north of U. S. Highway 80, those in that part of Tennessee on and east of U. S. Highway 27, and those in Mississippi, North Carolina, and South Carolina.

Analysis of the two routes discloses that the regular and irregular routes overlap and include a part of the same territory by virtue of the fact that certain points and places in Alabama—for example, Anniston, Heflin, Oxford and Hollis School—are on the regular route, and also within the sixty-five-mile radius of Birmingham covered by the irregular route.

In the report of the Commission, Division 5, Docket No. MC-C-1132, August 23, 1951, an order was issued requiring plaintiff, Malone Freight Lines, Inc., to cease and desist from all operations in interstate commerce that involved certain unauthorized use of irregular route radial authority in violation of the Interstate Commerce Act.[5] This irregular route authorized shipment of property between two radial territories, a radial base area, hereinafter referred to as the base area, on the one hand, and a radial destination area, hereinafter referred to as the destination area, on the other. The base area included, among other things, points and places within sixty-five miles of Birmingham, Alabama. The destination area included numerous points, places and territories within eleven different states (including territory in Georgia north of U. S. Highway 80). The operation found to be unlawful consisted of transporting

[5] 49 U. S. C. A. Sec. 306(a), Interstate Commerce Act, Part II, Sec. 206(a).

property between two points in the same destination area rather than between the base area and the destination area of the irregular route. For example, Malone would transfer property from LaGrange, Georgia, to New York City, New York, both origin and terminus being within the destination area of the irregular route. Such operations were performed under a claim of right as follows:

> STEP 1. Under authority of the described irregular route from the origin, LaGrange, Georgia, a point within the destination area of the irregular route to Hollis School, Alabama, a common point on both the regular and irregular routes.
>
> STEP 2. From Hollis School, Alabama, under authority of the described regular route to Anniston, Alabama, a common point on both the regular and irregular routes.
>
> STEP 3. From Anniston, Alabama, under the same authority used in Step 1 to New York City, New York, a place within the destination area of the irregular route.

Malone contends this operation is authorized by lawfully tacking or combining, at common points, the regular and irregular routes as shown above, by using the irregular route from LaGrange, Georgia, to Hollis School, Alabama; the regular route from Hollis School, Alabama, to Anniston, Alabama; and the irregular route from Anniston, Alabama, to New York City, New York. The Commission and interveners claim this to be a double use of the irregular radial route authority under a subterfuge of tacking or combining the regular route without actual use of the regular route.

This cause is here on review upon the charge of the plaintiff that the order of the Commission was issued arbitrarily, unlawfully and capriciously and under and by reason of a disregard of the essential and basic facts and misapplication of the law, by which action complainant is about to be deprived of property of great value without due process of law and to its irreparable damage.

An examination of the evidence upon which the order of the Commission is based reveals the fact that there is no

dispute about the complex but uncontroverted facts surrounding the operation by Malone Freight Lines, Inc. The manner of operation found to be unlawful was admitted. The only question to be resolved here is whether the order of the Commission is lawful that found the action of Malone to be unlawful.

There can be no question but that a motor common carrier can operate in interstate commerce only under a certificate of authority issued by the Intertate Commerce Commission [6] or that the certificate shall specify the service to be rendered, the routes and territories where operations may be conducted or that from time to time the Commission may add such other reasonable terms, conditions and limitations as the public convenience and necessity may require.[7] Nor is there any doubt but that the general control of motor carrier is left to the continuous supervision and regulation of the Commission [8] or that the Commission should first resolve those questions of law and fact peculiar to its own sphere of competence.[9]

Our function does not involve a de novo construction of the certificate or a re-evaluation of the undisputed facts relating to the services being performed under the pretended warrant of its authority. We are not concerned with the weight of the evidence. The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law.[10] It is beyond our province to con-

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[6] 49 U. S. C. A. Secs. 306, 307, Interstate Commerce Act, Part II, Secs. 206, 207.

[7] 49 U. S. C. A. Sec. 308, Interstate Commerce Act, Part II, Sec. 208.

[8] 49 U. S. C. A. Sec. 304, Interstate Commerce Act, Part II, Sec. 204.

[9] *Akers Motor Lines, Inc.* v. *Malone Freight Lines, Inc.*, 88 F. Supp. 654.

[10] 5 U. S. C. A. Sec. 1009, Administrative Procedure Act, June 11, 1946, as amended.

sider "the soundness of the reasoning by which its conclusions were reached." [11]

Plaintiff's primary contention throughout is that the regular and irregular routes were purchased from different companies at different times and that they may be combined, unified or tacked to perform these services lawfully. The irregular route was purchased from Howard Hall Company in 1945.[12] The regular route was purchased from North Alabama Motor Express in 1947,[13] at which time the Commission, in report MC-F-3488, decided December 19, 1947, stated in its general provisions that "in conducting regular and irregular route operations under the unified rights, Malone will be expected to preserve the separate nature of the operations and to operate within the scope of the rights by moving traffic only through authorized gateways.[14]

The Commission, by its order, recognized and permitted this unity of rights. In effect, the holding of the Commission is that the irregular route authority may be used to transport property from a point in the authorized eleven-state destination area to the base area or, specifically, to any common point or gateway of the two routes within the

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[11] As stated by Mr. Justice Brandeis, *Virginian Railroad Co.* v. *United States*, 272 U. S. 658, 663, a rate case. It was applied to a case under Motor Carrier Act by *National Moving & Warehouse Corp.* v. *Interstate Commerce Commission*, 48 F. Supp. 284 (1942). See *Alton R. Co.* v. *United States*, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; *United States* v. *Carolina Carrier Corp.*, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971; *Chicago, R. I. & P. R.* v. *United States*, 274 U. S. 29, 47 S. Ct. 486, 71 L. Ed. 911; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941; *Interstate Commerce Commission* v. *Ill. Central Railroad*, 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280; *United States* v. *New River Co.*, 265 U. S. 533, 44 S. Ct. 610, 68 L. Ed. 1165.

[12] Malone Freight Lines, Inc.—Purchase—Howard Hall Co., 40 M. C. C. 161 (decided March 27, 1945).

[13] Malone Freight Lines, Inc.—Purchase—North Alabama Motor Express, 50 M. C. C. 804 (Decided December 19, 1947).

[14] This general provision, in substance, may be found in Malone Freight Lines Inc.—Purchase—Howard Hall Co., 40 M. C. C. 161, 170 (1945), and again in Malone Freight Lines, Inc.—Purchase—North Alabama Motor Express, 50 M. C. C. 804 (1947).

base area. This exhausts the authority of the irregular route. At this common point or gateway, the two routes may be tacked, unified or combined, and the property transported under authority of the regular route to any point on the regular route. At this point both the authority for the regular route as well as the authority of the unified rights of the combined routes are exhausted.

The plaintiff contends, on the other hand, that the unified rights are not exhausted but that it may then tack, unify or combine the two routes at a second common point and use the irregular route authority for a second time in making a through-movement to any other point in the eleven-state destination area of the irregular route.

It is a well settled proposition that under the irregular route authority alone such a cross-haul between points in the same destination area is not authorized, even though the service is performed through the base area.[15] It is equally well settled that the same result may not be accomplished by tacking, unifying or combining an irregular route with a regular route co-terminus with the base area of the irregular route.[16]

The fact that two routes were acquired at different times and unified in a single certificate cannot be interpreted to mean that Malone has greater rights than if they were acquired at the same time in a single certificate. To construe

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[15] *Jack Cole Co., Inc., Common Carrier Application*, 32 M. C. C. 199; *Gay's Exp., Inc.*, v. *Haigis and Nichols*, 43 M. C. C. 277; *National Moving & Warehouse Corp.* v. *Interstate Commerce Commission*, 48 F. Supp. 284; *Gonez* v. *Interstate Commerce Commission*, 48 F. Supp. 286; *Interstate Commerce Commission* v. *G. & M. Motor Transfer Co., Inc.*, 64 F. Supp. 302; *Garford Trucking, Inc.*, v. *United States*, 64 F. Supp. 780.

[16] *Southwest Freight Lines* v. *Interstate Commerce Commission*, 184 F. 2d 149, 86 F. Supp. 587.

The order of the Commission sustained in full the recommendation of the examiner which included the finding that this identical operation by Malone was previously considered and found unlawful. This finding was made by the examiner in his report, Docket No. MC-C-1132, and repeated by the Commission in its order, 53 M. C. C. 353, 355. The previous decision referred to is *Malone Freight Lines, Inc.—Lease—Safety Transp. Corp.*, 56 M. C. C. 571 (decided May 19, 1950).

the unified rights of the two routes to mean that plaintiff could transport property from any point in the eleven-state destination area to any other point in that area by tacking, unifying or combining to perform service along the regular route would be "reading into its certificate an authority, not granted by the terms and provisions thereof, by custom, practice, or generally accepted interpretation of such authority as is granted in said certificate. First of all, because such a reading and contention wholly overlooks the 'service' defendant is authorized to perform under its certificate. Second, such a transportation constituted cross-hauling the 'base point' authority granted in the certificate. And, third, defendant thereby diffuses the base point of its irregular route authority into several base points not granted in the certificate." [17]

To sustain Malone's position would be to ignore completely the concept of "service" of any kind to any common point on the regular route. It is apparent that no service to points on the regular route is performed by tacking, unifying or combining the two routes at dual common points to serve those points indirectly under authority of the regular route when they may be served directly under authority of the irregular route and when, in fact, the movement is actually made to perform service between two points in the eleven-state destination area, none of which are common to the regular route.

It is not felt that Title 49 U. S. C. A. Section 312, (Interstate Commerce Act, Part II, Section 212), providing for the revocation of a certificate, is applicable, and to apply it would be to assume the plaintiff's contention of the issue, namely, that the contested operations were authorized by the certificate and revoked by the Commission's order. The Commission's interpretation of the certificate never included the finding that these operations were authorized and thus it could not revoke authority that never existed.

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[17] *Interstate Commerce Commission* v. *Southwest Freight Lines*, 86 F. Supp. 587, 593.

The order of the Commission is affirmed. An appropriate order will be prepared and entered dismissing the complaint with prejudice to plaintiff.

Done, this the 13th day of October, 1952.

RICHARD T. RIVES,
United States Circuit Judge.
C. B. KENNAMER,
United States District Judge.
SEYBOURN H. LYNNE,
United States District Judge.

Filed in Clerk's Office, Northern District of Alabama, October 13, 1952. Chas. B. Crow, Clerk, U. S. District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 6941

MALONE FREIGHT LINES, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

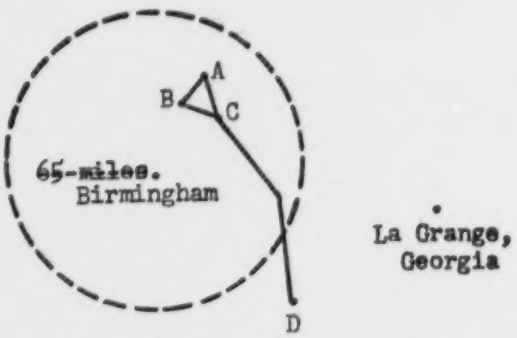
MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees move that the judgment of the District Court in the above action be affirmed.

This is a direct appeal from a final decree dismissing appellant's complaint entered October 13, 1952, by a three judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The complaint sought to set aside an order of the Interstate Commerce Commission which prohibited appellant from conducting certain motor carrier operations found by the Commission to be unauthorized by appellant's certificate of public convenience and

necessity. *Ackers Motor Lines* v. *Malone Freight Lines,* 53 M.C.C. 353.

The operations involved in the instant case are shown by the following diagram:



Appellant's certificate provides two separate route authorizations. Appellant has a regular route covering points A, B, C, and D in Alabama. It also has an irregular route between "points and places in Alabama within 65 miles of Birmingham, Ala., including Birmingham, on the one hand [the "radial base area" shown in the dotted circle], and, on the other "a number of specified cities and areas outside the radial base area (the "destination area").[1] Some points on the regular route are

[1] Both of these routes were acquired by purchase—the irregular route in 1945 (40 M.C.C. 161) and the regular route in 1947 (50 M.C.C. 804). In approving each of these purchases the Commission stated in substance that "in conducting regular and irregular route operations under the unified rights, Malone will be expected to preserve the separate nature of the operations and to operate within the scope of the rights by moving traffic only through authorized gateways."

also within the radial base area. By combining these two routes, appellant has been able to haul between two points in the destination area. For example, appellant picks up goods in La Grange, Georgia, a point in the destination area, carries them to point B under its irregular authority, then from B to A over its regular route, and from A to New York City via its irregular route. It is this service which the Commission found was unauthorized by appellant's certificate.

The Commission held, after appropriate administrative proceedings,[2] that appellant's certificate did not authorize "through service between points in the same radial destination area." The Commission noted that appellant's regular and irregular operating rights had been purchased from different carriers, but stated that it could perform no greater service than its predecessors could have performed by interchange. The Commission pointed out that appellant's irregular route predecessor was authorized to operate from points in its base area to points in its destination area, and

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[2] The Commission proceedings were instituted by a complaint filed by five motor carriers operating in the same area as appellant. Hearings were held before an examiner, the latter filed a recommended report, and exceptions thereto were filed. Contrary to appellant's contention, the Commission proceedings clearly complied with the requirements of Section 8(b) of the Administrative Procedure Act.

Prior to the Commission proceedings, the same complainants had sought an injunction in the district court against appellant's operations, but the court had held that primary jurisdiction over the matter was in the Commission and dismissed the complaint. *Akers Motor Lines* v. *Malone Freight Lines*, 88 F. Supp. 654.

vice versa, but that a "grant of irregular-route radial authority always carries with it, by reason of its essential character, a restriction against the transportation of shipments between two points in a radial territory even through a 'base point' " (53 M.C.C. 357). The Commission stated that although appellant could combine its regular and irregular routes at a common point,[3] it could not tack its irregular route to its regular route at two points "for the purpose of accomplishing a single through movement between an origin and a destination, both of which are in the same radial destination territory" (53 M.C.C. 358).

The district court, in a carefully considered opinion, unanimously affirmed the order of the Commission. We submit that this decision is plainly correct, and that no substantial question warranting further review by this Court is presented.

As the district court pointed out, it is well settled that an irregular route authority of itself does not permit cross hauling between points in the same destination area, even though the service is performed through the base area.[4] Nor can such cross hauling be accomplished by combining an irregu-

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[3] Thus appellant could haul from D to A on its regular route, and then from A to New York City on its irregular route.

[4] *Jack Cole Co., Inc., Common Carrier Application*, 32 M.C.C. 199; *Gay's Express, Inc.* v. *Haigis and Nichols*, 43 M.C.C. 277; *National Moving & Warehouse Corp.* v. *Interstate Commerce Commission*, 48 F. Supp. 284; *Gonez* v. *Interstate Commerce Commission*, 48 F. Supp. 286; *Interstate Commerce Commission* v. *G. & M. Motor Transfer Co., Inc.*, 64 F. Supp. 302; *Garford Trucking, Inc.* v. *United States*, 64 F. Supp. 780.

lar route with a regular one. *Southwest Freight Lines* v. *Interstate Commerce Commission,* 184 F. 2d 149 (C.A. 8). The fact that appellant's regular and irregular operating rights were purchased separately from different carriers, or that a single certificate was subsequently issued setting forth both of these rights,[5] cannot enlarge appellant's operating authority beyond that originally granted. Appellant's construction of its certificate would enable a carrier to render direct service between points in its destination area by the simple expedient of acquiring a small regular route in the base area.[6]

Congress has entrusted to the Commission the "precise delineation of the area or the specification of the localities which may be served" by motor carriers. *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 480. The Commission's "expert" judgment in this regard will not be set aside by the reviewing court unless the error is "patent." *Ibid.,* p. 480; *Southwest Freight Lines* v. *Interstate Commerce Commission, supra,* p. 151. Certificate authority to haul between points in a base area "on the one hand" and points in the destination area "on the other" obviously does not

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[5] The Commission frequently issues a new certificate containing several operating authorities previously acquired by the carrier. Appellant's own certificate contains other operating authorities than those involved in the instant case.

[6] Appellant's contention that the Commission's order has in effect revoked its regular operating authority is without substance. The Commission has merely construed the certificate; appellant can continue to use its regular route within the limits of its operating authority.

sanction service between points solely in the destination area. *Gay's Exp. Inc.* v. *Haigis and Nichols,* 43 M.C.C. 277, 279. The Commission's interpretation of its certificate is clearly correct and, as appellant concedes, the appeal presents only the narrow question of whether appellant "has been or is now operating in excess of the authority set forth in its Certificate of Public Convenience and Necessity."

For the foregoing reasons, it is clear that the appeal presents no substantial questions. It is accordingly submitted that the judgment of the district court should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.
EDWARD M. REIDY,
Chief Counsel, Interstate Commerce Commission.

NOVEMBER, 1952.

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SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
DEC 15 1952

OCTOBER TERM, 1952.

No. 505

MALONE FREIGHT LINES, INC.,
Complainant,
v.
THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION OF INTERVENORS TO AFFIRM

Now comes Akers Motor Lines, Inc., a North Carolina Corporation domiciled at Gastonia, North Carolina, Carolina Freight Carriers Corporation, a North Carolina corporation domiciled at Cherryville, North Carolina, McLean Trucking Company, Inc., a North Carolina corporation domiciled at Winston-Salem, North Carolina, Atlanta-New Orleans Motor Freight Company, Inc., a Georgia corporation domiciled at Atlanta, Georgia, Johnson Motor Lines, Inc., a North Carolina corporation domiciled in Charlotte, North Carolina, interveners, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, and move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree [1] entered on October 13, 1952 of a specially constituted District Court

[1] The District Court also filed contemporaneously an opinion.

of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, affirming an order of the Interstate Commerce Commission issued on August 23, 1951 and dismissing the action in this Court with prejudice. An appeal was allowed October 30, 1952 and the appeal papers were served on the same date.

The Commission's order dated August 23, 1951 required the appellant to cease and desist certain operations found to be unlawful and beyond the scope of authority granted appellant. A Petition for Reconsideration was denied by the Commission on February 15, 1952. The effective date of the order was postponed from time to time until November 1, 1952. The Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, issued an order on October 30, 1952, which order stayed the order of the Interstate Commerce Commission dated August 23, 1951, pending the action of the Supreme Court upon the jurisdictional aspect of the case and further provided, should the Supreme Court note probable jurisdiction or postpone consideration of the jurisdictional aspect until the hearing on the merits, then the stay would continue pending the decision of the Supreme Court.

The appeal papers served upon your movants contained no Assignments of Error but the statement of the basis on which appellant relied to maintain jurisdiction as required by Rule 12 of the Revised Rules of the Supreme Court of the United States stated in Paragraph V "the issue" as whether or not Malone Freight Lines, Inc., has been or is now operating in excess of the authority set forth in its Certificate of Public Convenience and Necessity of January 31, 1950, issued to it by the Interstate Commerce Commission in Docket No. MC-75840, and whether, as a matter of law, operations as conducted are authorized by the Certificate. Later in said paragraph, appellant contended that the Commission has entirely ignored the fact that in every

instance the freight moves over the regular route acquired from Alabama Motor Express, Inc. and that Two authorities are always involved, which authorities Malone acquired from Two separate sources, at Two different times, in separate proceedings, both approved by the Commission with Special Provision for Joinder of Routes.

Should these statements be considered Assignment of Error, they are so unsubstantial as to need no further argument. The opinion of the specially constituted District Court in this matter so clearly answers all of the contentions of the appellant that further discussion would be superfluous. The appeal raises no question except those clearly discussed in the opinion and adequately treated.

It is respectfully submitted that the District Court's conclusions are correct and should be sustained.

Respectfully submitted,

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[redacted]

No. 505

[redacted]

THE UNITED STATES OF AMERICA, and the
STATE CORPORATION COMMISSION,
[redacted]

BRIEF

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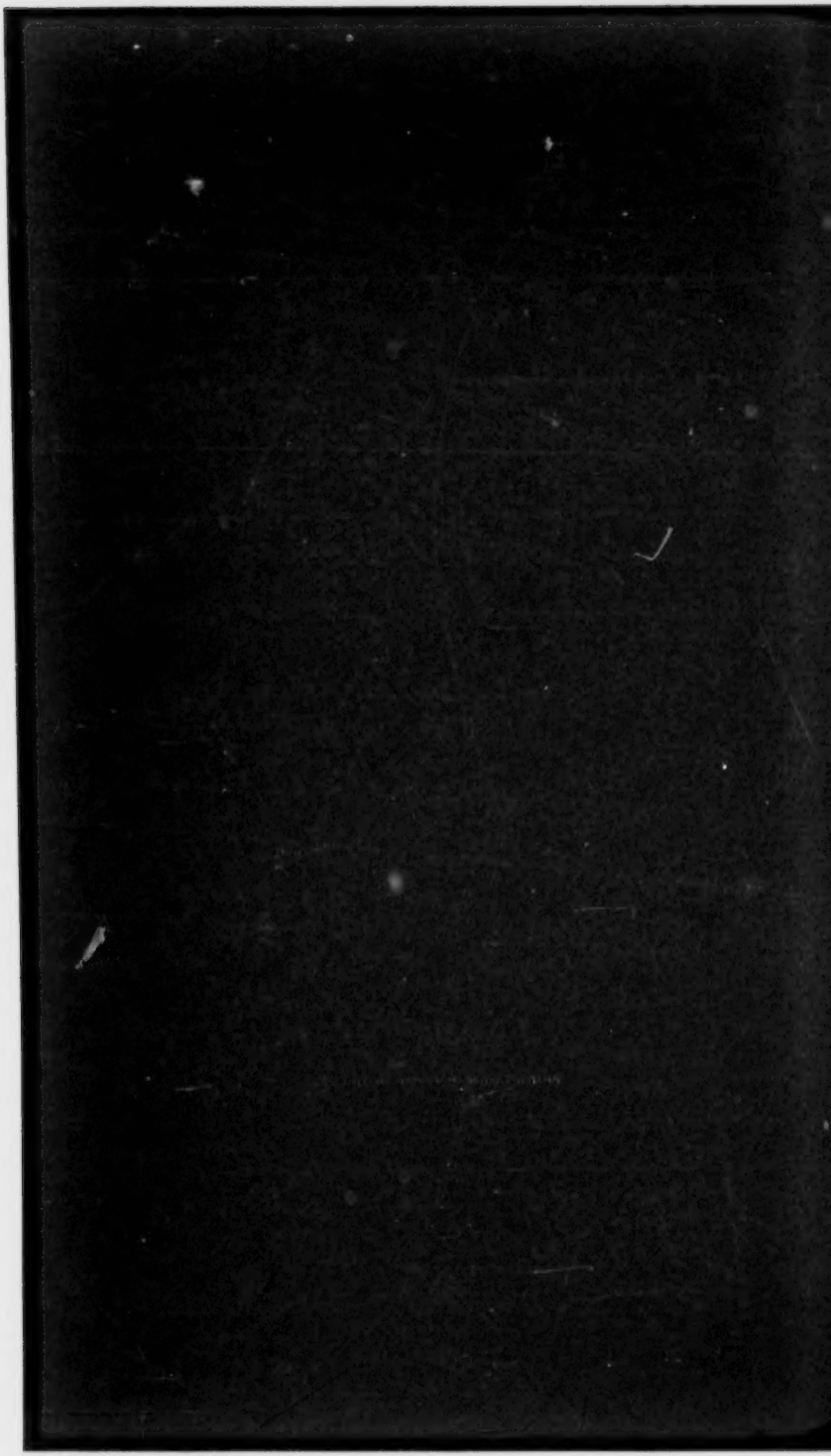

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. .....

MALONE FREIGHT LINES, INC.,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

BRIEF

Filed by Malone Freight Lines, Inc., in Reply to Motions to Affirm.

MAY IT PLEASE THE COURT:

Comes the plaintiff-appellant, Malone Freight Lines, Inc., and respectfully submits this its brief in the above-styled cause wherein it undertakes to reply to two (separate) motions to affirm the judgment of the United States District Court for the Northern District of Alabama, Southern Division, in Civil Action No. 6941, dated October 13, 1952, dismissing the application for injunction.

Malone has appealed directly to this Court from the action of the three-judge court below affirming an order of the Interstate Commerce Commission of August 23, 1951, in its Docket No. MC-C-1132 directing the carrier to cease

and desist from further operations found by the Commission to be in excess of the authority granted in a Certificate of Public Convenience and Necessity issued to Malone on January 31, 1950, in the Commission's Docket No. MC-75840. The appeal has been taken pursuant to the provisions of Title 28, Section 1253, U. S. Code, 62 Stat. 926.

PREFACE.

The opinion below and the motions to affirm would invest the problem before us with a degree of complexity that we do not believe to exist. There is no dispute as to the facts. The simple issue presented by the appeal is whether the Interstate Commerce Commission, as a matter of law, has the authority to preclude one motor carrier, which has become the owner, with the approval of the Commission, of certain operating rights formerly granted by that Commission to two such carriers, from performing an integral transportation service which the two initial carriers, in conjunction, could have performed.

In the course of our brief we shall point out various inconsistencies in the rulings of the Commission with reference to this problem. We realize, however, that this Court is not concerned with inconsistencies in administrative rulings, as such. We take the position, however, that where such patent inconsistencies exist, and there is a fundamental question involved with respect to the proper interpretation of a federal statute, such as Part II of the Interstate Commerce Act, that it is incumbent upon this Court to determine which interpretation is correct. Certain of the issues here presented have never before been passed upon by this Court, to our knowledge, and consideration and determination thereof by this Court is of paramount importance to a very large segment of the motor carrier industry, which constitutes a very important part of our nation's over-all transportation system.

The undisputed facts of record, and the opinion below, and the (two) motions to affirm, stripped of all surplusage, argument, and legal verbosity, boil themselves down to this simple proposition:

Two carriers, whom we shall for the present designate as "Carrier A" and "Carrier B", owned motor carrier operating rights granted by the Interstate Commerce Commission, which rights overlapped to some degree in an area within a radius of 65 miles of Birmingham, Alabama. The rights owned by one of the carriers constituted what the Commission had termed "irregular-route authority" while the rights of the other had been characterized by the Commission as "regular-route authority". At the risk of some digression, let us say at this point that, by a combination of their operating authorities, these carriers could lawfully, within the decisions of the Commission and of this Court, transport to and from the origin and destination areas involved in this proceeding all the commodities which appellant seeks to transport, between all the points and places appellant seeks to serve.

In the due course of events, appellant herein, Malone Freight Lines, Inc., acquired the operating rights of the two carriers above named, with the approval of the Interstate Commerce Commission, after representing to the Commission that it (Malone) proposed to combine the operating authorities and to transport freight by joinder of the regular and irregular routes so as to render all the services which "Carrier A" and "Carrier B" could have rendered by a two-line movement. In other words, appellant informed the Commission, clearly and definitely, that it proposed to substitute a single-line movement for a two-line movement which its vendors were authorized to perform in combination.

As we have said above, there was an overlapping of the regular and irregular routes within a radius of 65 miles

of Birmingham. This fact was brought to the attention of the Commission's examiner at the time purchase by Malone of the regular-route authority was under consideration. Such overlapping was recognized by the Commission to be lawful when it authorized the purchase by appellant of the regular-route authority and the joinder, without restriction, of that authority with other routes then possessed by the appellant, including the irregular-route authority to which we have referred heretofore.

Repeating, with the approval of the Commission, Malone Freight Lines, Inc., purchased the rights of "Carrier A" and "Carrier B", with the Commission being forewarned that it proposed to join the rights and render a unified service over all routes, and between all points, the two vendors could have operated, and for several years has rendered as a single-line carrier such services as "Carrier A" and "Carrier B" were authorized by the Commission to render in combination.

And now, at the behest of competing carriers, we are confronted with a ruling of the Interstate Commerce Commission, approved by the court below, which is simply this: (1) That the transportation services appellant has been (and is) performing as a single-line carrier may not lawfully be continued, although, as a matter of law, the same service could be rendered by "Carrier A" and "Carrier B" by interline, had not appellant with full and complete Commission approval purchased both rights, with the knowledge on the part of the Commission that appellant was acquiring the regular-route authority for that specific purpose; (2) The practical effect, as a matter of law, of the decision of the Commission and of the court below is to hold that where there is an overlap in regular and irregular-route authority granted to a carrier by the Interstate Commerce Commission that such effects a revocation of the regular-route authority without resort to the orderly processes for such revocation as provided in Sec-

tion 212 of the Interstate Commerce Act, Part II (Title 49, U. S. Code, Sec. 312), to which we shall hereinafter allude, and that appellant must perforce use only the irregular-route authority held by it; (3) The regular-route authority acquired with the consent of the Commission is a valuable property right and appellant should not be deprived of it without due process of law, the only due process therefor prescribed being that set forth in Part II of the Interstate Commerce Act (Title 49, U. S. Code, Chap. 8), to which we shall hereinafter refer more in detail; (4) We know of no authority in law, and certainly none has been set forth in either the opinion below or the motions to affirm, which would prevent a motor carrier holding both regular and irregular-route authority, with Commission approval, with no restriction against joinder of such routes at common points, from rendering as a single-line operator all the services the previous owners of those rights could have rendered lawfully by a combination of their rights and services, so long as the owner of both rights complies with the applicable rules and regulations of the Interstate Commerce Commission. And there is nothing in this record to suggest, even remotely, that Malone Freight Lines, Inc., has not complied scrupulously with all applicable rules and regulations of the Commission.

Our position is that this is a matter of substance which has not heretofore been presented to, or passed upon, by this Court; that it is fundamental in relation to interpretation of the power of the Interstate Commerce Commission in administering the Interstate Commerce Act, Part II (Title 49, U. S. Code, Chap. 8); that the Act does not lend itself to the interpretation placed thereon by the Interstate Commerce Commission, as sustained in the opinion of the court below; and that both such interpretation and opinion are erroneous as a matter of law, which we shall hereinafter point out in greater detail.

We further contend that the Commission by its orders in the acquisition proceedings granted Malone Freight Lines, Inc., exactly what it sought, with knowledge of just what it wanted, and now has undertaken collaterally, and without resort to Section 212 of the Interstate Commerce Act, Part II (Title 49, U. S. Code, Sec. 312), to deprive Malone of valuable rights "by interpretation"; that it has undertaken to do indirectly what it cannot do directly.

THE OPINION BELOW.

The opinion below states concisely the facts. We are attaching hereto as Appendix "A" a copy thereof for the convenience of this court. The manner of operation found by the Commission to be unlawful was (and is) admitted. Furthermore, the question to be resolved by the court below was whether the order of the Commission finding the operations of Malone to be in excess of its authority was a lawful order. The same is true with respect to this appeal.

There are some portions of the opinion below to which we would direct the attention of this court:

> "Our function does not involve a de novo construction of the certificate or a re-evaluation of the undisputed facts relating to the services being performed under the pretended warrant of its authority. We are not concerned with the weight of the evidence. The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, **or that it did violence to some established principle of law. It is beyond our province to consider 'the soundness of the reasoning by which its conclusions were reached.'** " (Emphasis added.)

. . . "The irregular route was purchased from Howard Hall Company in 1945. The regular route was purchased from North Alabama Motor Express in 1947," . . .

. . . "The Commission, by its order, recognized and permitted this unity of rights." . . .

. . . "The fact that the two routes were acquired at different times and unified in a single certificate cannot be interpreted to mean that Malone has greater rights than if they were acquired at the same time in a single certificate." . . .

. . . "It is not felt that Title 49, U. S. C. A., Section 312 (Interstate Commerce Act, Part II, Section 212), providing for the revocation of a certificate, is applicable, and to apply it would be to assume the plaintiff's contention of the issue, namely, that the contested operations were authorized by the certificate and revoked by the Commission's order. **The Commission's interpretation of the certificate never included the finding that these operations were authorized and thus it could not revoke authority that never existed.**" (Emphasis ours.)

THE MOTIONS TO AFFIRM.

In substance, counsel for defendants-appellees and for certain motor carrier interveners contend that the decision of the lower court is plainly correct, and that no substantial question warranting further review by this court is presented.

With these contentions we earnestly disagree. We take the position that the appeal presents not one, but several, substantial questions.

THE ASSIGNMENT OF ERRORS.

Appellant says that the order of the Interstate Commerce Commission is erroneous and invalid for the following reasons:

1. It is based upon an inadequate statement of findings and conclusions, as well as the reasons or bases thereof, upon all the material issues of fact, law, or discretion presented on the record in I. C. C. Docket No. MC-C-1132, **Akers Motor Lines, Inc., et al., v. Malone Freight Lines, Inc.**, 53 M. C. C. 353, as required by the Administrative Procedure Act, U. S. Code, Title 5, Section 1007 (b).

2. The order, if permitted to stand, will result in the revocation of the regular-route certificate of appellant without compliance with the provisions of Title 49, Section 312, U. S. Code (Interstate Commerce Act, Part II, Sec. 212).

3. The Commission has failed and refused properly to interpret and apply Part II of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 8) as well as decisions of the Commission and the courts thereunder. The order arises from a wholly erroneous construction of that Act and such decisions.

4. If enforced, Malone Freight Lines, Inc., will be deprived of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. Enforcement of the order will mean that Malone acquired nothing of value when it purchased, with Commission approval, the regular route from North Alabama Motor Express, Inc., in 1947. This acquisition took place **AFTER** the carrier had obtained an informal interpretation by field representatives of the Bureau of Motor Carriers of the

Commission that operations then being performed by it under an identical state of facts with those in the case at bar were lawful. Furthermore, the record shows that the Commission was informed **BEFORE IT APPROVED THE TRANSFER** that Malone was intending to operate just as it has and that such was the sole purpose of the carrier in acquiring the rights from North Alabama Motor Express, Inc., in I. C. C. Docket No. MC-F-3488. The Commission, with that knowledge, not only approved the transfer but authorized the unification of that route with rights already possessed by this appellant.

5. If enforced, the order will prevent Malone, owner of both the regular and the irregular routes, from rendering all the services, and performing all the operations its vendors could have rendered and performed in combination, despite the fact that, in each instance, the Commission specifically authorized joinder of the routes and authorities so acquired with other routes possessed by appellant herein.

6. The order, if enforced, will cause the appellant to suffer irreparable injury. Not only will it lose the $2,500 it paid for the regular route, but it will have to release trained personnel and materially reduce its fleet of motor vehicles. It will lose business it has developed over a period of years by the expenditure of much time and money. Its patrons will be forced to seek other means for the transportation of their goods.

The District Court erred in the following respects:

(1) In ruling that Malone may not lawfully transport property over public highways in interstate commerce in the manner described in the opinion of the court below, such as:

From Lagrange, Ga., a point within the destination area of the irregular route, to Hollis School, Ala., a common point on both routes; thence from Hollis School along the regular route to Anniston, Ala., a common point on both routes; and from said Anniston under the irregular route authority acquired from Howard Hall Company to a destination such as New York, N. Y.

(2) In not specifically finding that operations such as those mentioned just above are authorized by the Certificate of January 31, 1950, issued by the Commission to Malone Freight Lines, Inc., in Docket No. MC-75840.

(3) In not setting aside and enjoining enforcement of the Commission's order of August 23, 1951, in its Docket No. MC-C-1132.

IMPORTANT FACTUAL MATTERS NOT MENTIONED IN EITHER THE ORDER OF THE COMMISSION OR IN THE OPINION OF THE COURT BELOW.

Early in 1946, prior to Malone's purchase of the regular route from North Alabama Motor Express, Inc. (approved by the I. C. C. on Dec. 19, 1947), appellant was engaged in transporting freight from Atlanta, Georgia, to Jackson, Mississippi, by combining its irregular route authority acquired from Howard Hall Company (the one involved in the instant proceeding) with a regular route acquired by purchase from Robert H. Crates. The lawfulness of this operation—which we contend was identical with the one now under consideration—was questioned, and an investigation by the field staff of the Bureau of Motor Carriers of the Interstate Commerce Commissoin was instituted. The conclusion was reached that the operations were legal. We now reproduce the letter so informing appellant, which communication was inserted in the

Commission's record in Docket No. MC-C-1132 as Exhibit 2 to the transcript of hearing at Washington, D. C., on May 9, 1950, and is therefore a part of the record on this appeal:

Interstate Commerce Commission,
Bureau of Motor Carriers.

1002 Martin Building,
Birmingham 3, Alabama,
February 12, 1946.

Refer: O
MC 75840

Mr. J. R. Oden, President,
Malone Freight Lines, Inc.,
3325 Tenth Avenue North,
Birmingham, Alabama.

Dear Mr. Oden:

This has reference to our conversation concerning transportation by your company of Kraft products from Atlanta, Georgia, to Jackson, Mississippi. It was understood that motor vehicles engaged in this service actually moved from Atlanta, Georgia, over irregular route franchise you acquired by purchase from Howard Hall Company, Inc., to Pinson, Alabama. From Pinson the motor vehicles moved to Birmingham, Alabama, over a portion of a regular route you acquired by purchase from Robert H. Crates. From Birmingham shipments moved to Jackson, Mississippi, over irregular route you acquired by purchase from Howard Hall Company, Inc.

Some doubt existed in my mind as to the propriety of this arrangement. Accordingly, I submitted the question to District Director Addams and have been informed that he and Attorney Pou are of the opinion

that transportation between the points and over the route described is legal.

This information is transmitted in accordance with your request that you be informed as to the outcome of my investigation.

Sincerely yours,

(S) James D. Johnson,
James D. Johnson,
District Supervisor.

JDJ/mjo

Mr. Johnson is still District Supervisor for the Bureau of Motor Carriers at Birmingham; Mr. Addams is still the District Director for the Bureau at Atlanta, with jurisdiction of motor carriers operating in interstate commerce in the States of Alabama, Georgia, and Florida; and Mr. Leo H. Pou, then Field Attorney for the Bureau, is now located in the Bureau of Law, Interstate Commerce Commission, Washington, in charge of enforcement matters for the Bureau of Motor Carriers.

In connection with the purchase of the regular route from North Alabama Express, Inc., J. R. Oden, then and now president of appellant, testified that his company intended, if the acquisition was permitted, to use the rights in combination with the irregular-route authority previously purchased from Howard Hall Company to transport freight from points in Georgia to destinations in the East just as has been done. He also explained that the traffic would be handled on the irregular-route authority from a Georgia point to the regular route, thence along the regular route to a gateway, and thence back again on the irregular-route authority to another point in Georgia. Such testimony is a part of the official record of the Commission in Docket MC-F-3488, and is a part of the record in this case. The testimony was given before an examiner of the Commission on October 10, 1947.

We now quote from the transcript in the North Alabama Motor Express case, I. C. C. Docket No. MC-F-3488 (p. 23):

"Q. And now, is it your proposal and purpose if the Commission approves this purchase to maintain those routes as regular routes?

A. Yes, sir.

Q. And will you in your operation, if approval is granted, move freight such as offered to you or tendered to your company between points located on these regular routes on the one hand, and points otherwise authorized to serve through such common gateways as may exist?

A. Yes, sir.

Q. In other words, after approval there will be two operations: First, that of the regular route purchased from Mr. Bookout's company, and, second, would be the combination of those routes with the presently authorized operating rights of the vendee?

A. That's correct.

Q. Now, what would be the common point which you presently are certificated to serve and those which you propose to purchase?

A. Anniston, Alabama.

Q. And where is Anniston located with respect to Birmingham?

A. Oh, it's about 60 miles Northwest of Birmingham."

The purpose of the acquisition of the North Alabama rights and the intention to combine those rights with the then certificated rights of Malone was again referred to on page 26 of the transcript:

"Q. Would the granting of this application permit you to conduct the operation that you described in the most direct and over the most direct and economical routes? For instance, between a point on the acquired

route and—on the one hand—and New York City on the other—would your operation be the most direct and reasonable route?

A. It might be longer than the most direct route, but would be negligible on that haul.

Q. Considering the highways?

A. I would prefer myself to go the longer route on account of the number of towns you have to go through on the shorter route. I think that the trip could be made in a shorter length of time over the longer route."

The unmistakable intention and request for authority so to do, to combine this regular route with the irregular route radial Howard Hall authority was again clearly brought out (R. p. 31):

"Q. Now, you say Anniston is a point you presently can serve?

A. That's right.

Q. And it's located within the radius of your irregular-route operations?

A. Yes, sir, from Birmingham.

Q. You said that in addition to the regular-route service you intend to combine that service with your present irregular-route service?

A. Through Anniston.

Q. Through Anniston?

A. Correct.

Q. Where the shippers offer you truckload volume moving from one of the points on the routes to be acquired, would that service be offered from the mill point through Anniston and then to the destination territory authorized to be served from Anniston?

A. That's correct.

Q. Would the same thing be true in the reverse direction?

A. Right, sir."

The method of operation under the combination of the two authorities was set out as follows (R. 33):

> "Q. How do you propose to operate by combining your irregular-route authority with the regular-route authority here proposed to be purchased?
>
> A. Well, we will operate that regular-route authority by rendering service over all points daily. It's a comparatively short route. That service will probably be rendered over the whole route daily, and it will either terminate or originate at Anniston . . . the service will. Now, on any freight originating on this regular route, of course, will terminate at Anniston at which point Malone would then move it, for instance, to Philadelphia on the irregular-route authority purchased from Howard Hall. Now, if we wanted to move any freight from New York City to Opelika, for instance, we would move it on the irregular-route authority purchased from Howard Hall to Anniston, Alabama, which is within our 65-mile radiation of Birmingham from Anniston. The operation of the regular route would deliver that freight to Opelika, which is the Southern point on this regular-route."

With respect to the unification of the regular-route authority and the irregular-route authority on shipments moving in the Georgia territory, Mr. Oden testified (R. 36):

> "A. We would pick up traffic at Roanoke and over regular routes carry it to Anniston on the regular-route authority, Anniston being between 65 miles of Birmingham, we could take on the irregular-route authority from Anniston to Thomaston (Georgia)."

In authorizing the transfer, based upon that record and testimony, Division 4 of the Commission commented:

> "Anniston, the Northern terminus of the routes proposed to be purchased, is within the previously de-

scribed 65-mile irregular-route radial base served by Malone. Malone maintains a terminal at this point."

Following consummation of its purchase of the regular-route authority, Malone began regularly to transport property from points and places in Georgia north of U. S. Highway 80 to such points as New York, N. Y., Philadelphia, Pa., and other eastern destinations, such operations being conducted openly and in the belief that appellant might lawfully do so. In other proceedings subsequent to the above hearing, Malone's president has freely conceded that the carrier was conducting operations of the character outlined above, explaining that it was doing so under a claim of right and in good faith, and amplifying his testimony with specific examples.

We repeat, there is no mention of this factual background in either the Commission's (Div. 5) decision, or in the opinion of the three-judge court below.

THIS COURT HAS NOT HERETOFORE RULED ON THE ISSUES PRESENTED IN THIS APPEAL.

Great reliance has been placed by counsel for defendants-appellees and for the intervening motor carriers on the decision of the Circuit Court of Appeals for the Eighth Circuit in **Southwest Freight Lines v. Interstate Commerce Commission**, 184 F. (2d) 149, 86 F. Supp. 587. Admittedly, some of the facts are similar to those in the case at bar, but there are as well several unmentioned material variations. Neither, we present, are the legal principles involved the same. First, there is not the factual background in the Southwest Freight Lines case such as we have outlined in some detail above. In passing, it should be pointed out, that this background in our case has been accorded no consideration by either the Commission or the

District Court, but we remain of the opinion that it is of vast importance from the standpoint of justice in determining the issues in the case at bar. Secondly, in the Southwest case, the Commission instituted an action for an injunction under Title 49, Section 322 (b), U. S. Code [Interstate Commerce Act, Part II, Sec. 222 (b); 49 Stat. L. 564] to restrain the carrier from further operations alleged to be in excess of the rights possessed by Southwest Freight Lines. In contrast, Malone applied to a three-judge court for an injunction to set aside an order of the Commission in the manner provided in 54 Stat. L. 916, Title 49, U. S. Code, Section 17 (9) [Interstate Commerce Act, Part I, Sec. 17 (9)], and Title 28, U. S. Code, Secs. 1336, 2284, and 2321-2325.

Insofar as we have been able to determine, no effort was made to appeal the decision in the Southwest Freight Lines case from the Circuit Court of Appeals for the Eighth Circuit to this Court. This Court has not ruled on the issues presented by this appeal.

MALONE SHOULD BE PERMITTED TO RENDER ALL THE SERVICES THE FORMER OWNERS OF THE REGULAR AND IRREGULAR ROUTES COULD HAVE RENDERED IN COMBINATION. THE ORDER OF THE COMMISSION, UPHELD BY THE DISTRICT COURT, WOULD PREVENT THIS ALTHOUGH THE TRANSFERS WERE NOT RESTRICTED AGAINST SUCH JOINDERS.

The Commission decided long ago, and has since repeated many times, that, where a physical connection of routes exists, the acquiring carrier after unification may render through service between all points authorized to be served on the connecting routes of both, provided the Commission does not impose restrictions which would prevent such unification. See **Clark-Lease-Ronken**, 36 M. C. C. 195, 201 (1940).

In **Powell Bros. Truck Lines, Inc.—Purchase—Bryan,** 39 M. C. C. 11, 14-15, the entire Commission said (1943):

> "In the operating authorities of regular-route carriers, the services which such carriers may perform are described in part by a listing of the several routes over which they may transport shipments. A certificate authorizing operations over two or more routes that have one or more points in common which the carrier is authorized to serve confers the right to operate over all combinations of such routes and between all the designated points thereon, **unless the service is specifically restricted in such certificate.**" (Emphasis ours.)

The case of **G. & M. Motor Transfer Company, Incorporated, Common Carrier Application,** 43 M. C. C. 497, the entire Commission considered the petition of the carrier for an interpretation of its certificate. The carrier was authorized to operate as a common carrier of general commodities, with certain exceptions, over irregular routes:

> . . . "From Elkin and Statesville, N. C., to points in Delaware, Georgia, Maryland, New Jersey, Ohio, Pennsylvania, South Carolina, Virginia, West Virginia and the District of Columbia, those in Tennessee on, east and south of a line * * *, and those in New York on and south of a line * * *
>
> * * * * * * * *
>
> **and**
>
> "From the above-described destination points to points in North Carolina."

In that case Commissioner Alldredge pointed out certain things that we think are in point in our case, such as:

> * * * "Regular-route carriers, for instance, are frequently authorized to extend their operations from

a point on an established route to a point not previously served, and such authority has been invariably construed in the absence of language to the contrary to permit through operations between points on the established route and points on the extension. Also, the right of both regular- and irregular-route carriers to interchange traffic with other common carriers at points which both are authorized to serve is well recognized, although not specifically mentioned in the certificates. **Lubbock-El Paso Motor Frt., Inc., Com. Carrier Application**, 27 M. C. C. 585, is a case in point.

* * * "It is conceded that petitioner may transport a through shipment, for example, from New York City to a point in Georgia as far as Statesville, N. C., if at that point it turns the shipment over to another common carrier. It is further conceded that petitioner may reload its truck from shipments originating in Statesville or received from some other carrier at that point and follow or precede the connecting line's vehicle into the Georgia destination. The shipment transported from Statesville to Atlanta by petitioner's truck may have also originated in New York City. The anomaly of such a result is scarcely defensible, yet it is entirely possible under the majority decision. Also, petitioner might sell its operating rights, with our approval, from Statesville to points in Georgia to another common carrier, following which petitioner would unquestionably have the right to haul a shipment from New York City to Statesville and deliver it to the new carrier, which derived its authority by transfer from the petitioner, for movement to Atlanta. By such a transaction the purchaser would obtain rights which petitioner does not possess, according to the majority, and there would thus be permitted in joint-line movements a service

which it is found petitioner could not perform in a single-line movement. It is probable, furthermore, that this restrictive interpretation may result in depriving some communities which are served only by petitioner of any through service from points beyond Statesville or Elkin. These circumstances can hardly be said to be conducive to adequate, economical, and efficient service which it is the National Transportation Policy of the Congress to promote."

We shall state our contention by the use of symbols for the sake of brevity and simplicity. If "Y" carrier acquired irregular-route rights designated as "Y", and "X" carrier acquired regular-route rights represented as "X", they could interline traffic at common points and thus bring into being a property right represented by "Z", which represents a through service by a combination of rights which had not before existed. This we believe to be beyond dispute. Furthermore, "X" carrier may lawfully transfer its freight to "Y" carrier at a common point, and subsequently "Y" could transfer the same lading back to "X" carrier at another common point. This might not be practicable, but it is a property right which "X" and "Y" can combine by private agreement, to which the Commission could not object. Question: If "A" carrier buys both certificates with the Commission's approval, **and without restriction,** should he not get the property right designated as "Z" also? But, according to the order of Division 5 of the Commission of August 23, 1951, in Docket No. MC-C-1132, as upheld by the three-judge court below, property right "Z" entirely disappears.

If the Commission had wanted to be certain of maintaining its so-called rule against "cross-hauling" base points within a radial territory in this factual situation (complainant-appellant denies that it has been cross-hauling its base points in the sense that that term has been used in

previous Commission decisions), it should have (1) either disapproved the purchase by Malone of the regular route from North Alabama Express, Inc., or (2) added the necessary restrictions when it approved the application for transfer. It did neither. It is manifest from the record that Malone would not have paid out $2,500 of its money and have purchased the regular route from North Alabama Express if there had been placed in the Commission's approval order therein a specific restriction against operations of the character openly engaged in by Malone for the past several years.

Furthermore, Malone did not "buy a pig in a poke" in view of the approval by three field representatives of the Bureau of Motor Carriers of operations similarly conducted, which informal opinion was based upon a complaint and an investigation, plus the fact that Malone's president testified at the hearing before the I. C. C. examiner and on the record that the purpose of the carrier in buying the regular route from North Alabama Express, Inc., was to operate just as Malone has been (and is) operating.

If Malone is not permitted to continue its presently conducted operations, we think it apparent that it will have been deprived of a property right without due process of law, and in violation of the Fifth Amendment to the Constitution.

Once the Commission approved the purchases **without express restriction** against "tacking", Malone should have acquired rights "X", "Y", and "Z". If the Commission made a mistake in approving the purchases without any restriction as to joinder or "tacking", it should be bound thereby, as was held by the court in **Boulevard Transit Lines, Inc., v. United States**, 77 Fed. Supp. 594 (N. J., 1948). In the cited case the Commission granted more

authority than it intended. The court said that it could not, upon realizing its mistake, revoke such authority where the statutory conditions for taking such a property right were absent.

There is to be remembered that the Commission on January 31, 1950, in its Docket No. MC-75840 issued to Malone a Certificate Of Public Convenience And Necessity listing both the regular and irregular routes with which we are dealing, **without restriction against "tacking" or joinder of the routes in question.** There has been no claim advanced that the certificate was issued through inadvertence. It would appear from a study of the penultimate paragraph of the opinion of the court below that the three-judge tribunal was of the opinion that Malone did not acquire property right "Z" as well as property rights "X" and "Y". With any such conclusion we are in respectful but violent disagreement.

If, as we insist, Malone did acquire property right "Z", this right cannot be taken from it (in view of the issuance of the certificate **without restriction,** and in the absence of any claim of mistake or inadvertence), except by compliance with the provisions of Title 49, U. S. Code, Section 312 (a) [Interstate Commerce Act, Part II, Sec. 212 (a)]. See **Boulevard Transit Lines, Inc., v. United States,** cited above; **Texas & Pacific Transport Co. v. U. S.,** 87 F. Supp. 107, reversed on other grounds, 340 U. S. 450; **U. S. and I. C. C. v. Seatrain Lines, Inc.,** 329 U. S. 424; and **Rock Island Motor Transit Co. v. U. S.,** 90 F. Supp. 516, 340 U. S. 419, 71 S. Ct. 382.

THE COMMISSION HAS LONG DISTINGUISHED BETWEEN ACQUISITIONS WHEREIN THE INVOLVED RIGHTS WERE ACQUIRED AT SEPARATE TIMES, FROM DIFFERENT CARRIERS, AND THOSE NOT SO ACQUIRED.

The court below attached little significance to this contention. On page 7 of its opinion it said in part:

> "The fact that two routes were acquired at different times and unified in a single certificate cannot be interpreted to mean that Malone has greater rights than if they were acquired at the same time in a single certificate. To construe the unified rights of the two routes to mean that plaintiff could transport property from any point in the eleven-state destination area to any other point in that area by tacking, unifying or combining to perform service along the regular route would be reading into its certificate an authority, not granted by the terms and provisions thereof, by custom, practice, or generally accepted interpretation of such authority as is granted in said certificate." . . .

In the **Jack Cole Co., Inc., Common Carrier Application case,** 32 M. C. C. 199, there was a single radial grant of authority between a base area, on the one hand, and a specified radial area on the other. We contend that, in that case, and in the **Gay-Express-Hargis case,** 43 M. C. C. 277 (both of these Commission decisions being referred to in the opinion of the court below), the interchanges claimed **were fictitious.** The Commission has made a distinction between its holding in the **Jack Cole case** and its holdings in **Aetna Freight Lines, Inc., Interpretation of Certificate,** 48 M. C. C. 610, and **Transport Corporation of Virginia, Extension of Operations—Maryland,** 43 M. C. C. 716, for the reason that the latter cases

involved two or more grants of authority, in contrast with one in the **Jack Cole case**, and in the latter (two) "tacking" of irregular-route authority with regular-route authority was specifically authorized and approved, as in the case at bar.

The Commission, by Division 5, as late as November 14, 1950, has ruled that a separate and indistinguishable property right **does exist where the authorities are obtained from different sources.** Unfortunately for us, the decision has not been reported in the official publication, "Motor Carrier Cases." We have it only in Vol. 7, Federal Carriers Cases, a Commerce Clearing House Publication, at page 656. The Division said in **Lota H. Yeatts, Extension—Several States**, MC-30237 (Sub No. 5):

> . . ."Ordinarily, a grant of authority to conduct a radial operation between a base point, such as Lynchburg, on the one hand, and points in a territory, such as Virginia, on the other, will confine the original grantee to operation to and from Lynchburg only. In other words, the service to be performed as to any particular shipment must either begin or end at Lynchburg. Compare **Gay's Express, Inc., v. Haigis and Nichols**, 43 M. C. C. 277. A somewhat different situation is here presented. Stone is not the original grantee and the unified right to operate between Lynchburg and points in Virginia is a consolidation of two separate rights formerly held by two separate carrier entities. Any unification of common-carrier rights creates the same, but no greater, rights than the two carriers might themselves have created by interchange prior to the unification. Prior to unification, Novick could have transported cedar chests from Altavista to Lynchburg and interchanged the shipment at that point with Turner for transportation from Lynchburg to Pulaski. **Since Novick and Turner could have performed a coordinated service from**

Altavista to Pulaski through Lynchburg, Stone, as purchaser of the separate rights, may perform a similar service. The unified right which Stone acquired by purchase must be as great as the separate rights of Novick and Turner, otherwise the unification will have resulted in a forfeiture, with Stone receiving something less than that which Novick and Turner sold. In the circumstances, we conclude that the unified right now held by Stone for the transportation of general commodities, with exceptions, between Lynchburg and points in Virginia, will permit it to transport cedar chests from Altavista to Pulaski, through Lynchburg, and that such right may be joined at Pulaski with other rights held so as to permit the transportation of cedar chests from Altavista to points in Indiana, Illinois, Kentucky and Tennessee, through Lynchburg and Pulaski. Similarly, it may transport veneer from Louisville and points in Indiana to Altavista, through Martinsville and Lynchburg." (Emphasis added.)

There is property right "Z"! If it was not lost in that instance, why, may we ask, was it lost (according to the Commission [Div. 5] and the court below) in the case at bar?

OPERATIONS AS CONDUCTED BY MALONE FREIGHT LINES, INC., ARE WITHIN THE SCOPE OF ITS RIGHTS.

Operations conducted under the Howard Hall Company purchase are described as "irregular-route radial." Presumably such a description must be based upon the Commission's findings in its order entitled **Classification of Motor Carriers of Property**, 2 M. C. C. 703. At page 709 irregular-route "radial" and "non-radial" are defined as follows:

"Irregular-route radial service—An irregular-route radial service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes from a fixed base point or points to points or places located within such radial area as shall have been fixed and authorized by the Interstate Commerce Commission in a certificate of public convenience and necessity, or permit, or **from any point** located within such radial area to such carrier's fixed base point or points.

"Irregular-route non-radial service—An irregular-route non-radial service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes **between** points or communities located within such general territory as shall have been defined geographically and authorized in a certificate of public convenience and necessity, or permit, and any other points or communities located within the same general territory without respect to a hub community or a fixed base point of operation." (Emphasis added.)

The principal difference between the two types of operation stems from the inclusions of the word "**FROM**" in the **radial** definition and the word "**BETWEEN**" in the **non-radial** definition.

Reference to the description of rights secured from Howard Hall Company, Inc., discloses that the operating rights are "**BETWEEN**" the areas described rather than "**FROM**" those areas.

Thus it would seem that the irregular-route authority involved in our case is definitely "**NON-RADIAL**" rather than "**RADIAL.**"

The Commission and the court below have ruled that Malone is using the irregular-route radial authority twice **without there being an actual use of the regular-route authority.**

Any such conclusion is without basis in the record. That is a very important consideration, for in the bona fide use of the regular-route authority by Malone, as we maintain, lies the distinction between the case at bar and the decisions in **the Jack Cole case**, 32 M. C. C. 199, cited supra, and in similar Commission decisions referred to in the opinion of the three-judge court involving alleged "cross-hauls" of a base point, including: **Gay's Express, Inc., v. Haigis and Nichols**, 43 M. C. C. 277; **National Moving & Warehouse Corp. v. I. C. C.**, 48 Fed. Supp. 284; **Gonez v. I. C. C.**, 48 Fed. Supp. 286; **I. C. C. v. G. & M. Transfer Co., Inc.**, 64 Fed. Supp. 302; **Garford Trucking, Inc., v. U. S.**, 64 F. Supp. 780. See typewritten copy of opinion of District Court, page 7.

SUMMARY OF ARGUMENT.

The order of the Commission is not predicated upon findings of essential facts, and therefore does not meet the requirements of the Administrative Procedure Act, Title 5, U. S. Code, Section 1007 (b); this Court has not heretofore ruled on the issues presented by this appeal; Malone acquired by the purchases of operating authority involved a definite property right which would be taken from it without the Commission having complied with the provisions of Title 49, U. S. Code, Section 312 (Interstate Commerce Act, Part II, Sec. 212) and in violation of the Fifth Amendment to the Constitution of the United States; the Commission has failed and refused properly to interpret and apply Part II of the Interstate Commerce Act (Chap. 8, Title 49, U. S. Code) and its own decisions and those of the several courts thereunder; the order, if enforced, will prevent

Malone, owner of both the regular and the irregular routes, from rendering all the services the previous owners could have rendered lawfully in combination; Malone is operating with the scope of its certificate from the Commission; and, finally, if the order is permitted to become effective, Malone will lose the purchase price it paid for the regular-route authority, and in addition, will suffer irreparable injury in the respects heretofore set forth.

CONCLUSION.

It is respectfully submitted, therefore, that the judgment of the District Court should be reversed and the order of the Interstate Commerce Commission of August 23, 1951, in its Docket No. MC-C-1132 should be set aside and held for naught.

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APPENDIX A.

In the
UNITED STATES DISTRICT COURT
For the Northern District of Alabama,
Southern Division.

Malone Freight Lines, Inc., Plaintiff,

vs.

The United States of America and The Interstate Commerce Commission, Defendants.

Civil Action No. 6941.

Before Rives, Circuit Judge, and Kennamer and Lynne, District Judges.

Lynne, District Judge.

Plaintiff correctly invoked jurisdiction of this district court of three judges in this action to set aside a final order of the Interstate Commerce Commission.[1]

This case arose as a result of action taken by several motor common carriers[2] and interveners[3] who caused to be heard before the Interstate Commerce Commission the issue of whether or not Malone Freight Lines, Inc., was engaged in certain unlawful operations beyond the scope of the authority granted in its certificate of public convenience and necessity.[4]

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1 28 U. S. C. A., Secs. 1336, 1398, 2284, 2321-2325; 49 U. S. C. A., Sec. 17 (9), Interstate Commerce Act, Part I; 49 U. S. C. A., Sec. 305 (h), Interstate Commerce Act, Part II, Sec. 205 (h).

2 Akers Motor Lines, Inc., Carolina Freight Carriers Corporation, Johnson Motor Lines, Inc., McLean Trucking Company, Inc., and Atlanta-New Orleans Motor Freight Company. These parties intervened as defendants in this action.

3 Central of Georgia, Georgia & Florida, Louisville & Nashville, Nashville, Chattanooga & St. Louis, Seaboard Air Line, and Southern railroads.

4 This case is an outgrowth of a complaint filed in this court praying for injunctive relief from the alleged illegal conduct of Malone Freight Lines, Inc. The court sustained a motion to dismiss, holding that the primary jurisdiction doctrine was applicable in that the plaintiff had not exhausted its administrative remedies before the Interstate Commerce

This certificate, No. MC-75840, January 31, 1950, provides, among other things, for two separate motor common carrier routes described here as a regular route and an irregular route, as follows:

Regular Routes: * * *

(Commodity description omitted since it is not in dispute.)

Between Anniston, Ala., and Opelika, Ala.:

From Anniston over U. S. Highway 78 via Oxford, Ala., to junction Alabama Highway 37, thence over Alabama Highway 37 via Roanoke and Lafayette, Ala., to Opelika (also from junction U. S. Highway 78 and Alabama Highway 37 over U. S. Highway 78 to Heflin, Ala., thence over Alabama Highway 9 to junction Alabama Highway 37; also from Lafayette over Alabama Highway 50 to Lanett, Ala., thence over U. S. Highway 29 to Opelika); and return over these routes. * * *

Irregular Routes: * * *

(Commodity description omitted since it is not in dispute.)

Between Montgomery, Ala., and points and places in Alabama within 65 miles of Birmingham, Ala., including Birmingham, on the one hand, and, on the other, Trenton, N. J., Philadelphia, Pa., New Orleans, Gretna, and Destrahan, La., New York, N. Y., Win-

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Commission. Akers Motor Lines, Inc., et al. v. Malone Freight Lines, Inc., 88 F. Supp. 654. A hearing was then held May 9, 1950, before the Interstate Commerce Commission under provisions of 49 U. S. C. A., Sec. 304 (Interstate Commerce Act, Part II, Sec. 204). A recommended report and order requiring Malone Freight Lines to cease and desist from certain operations was filed by the examiner, Tobias Naftalin, August 7, 1950. Malone filed exceptions September 15, 1950, and complainants replied October 12, 1950.

The report and order complained of herein of the Interstate Commerce Commission, Division 5, was entered August 23, 1951, in accord with the recommendations of the examiner. Malone filed a petition for reconsideration November 13, 1951, which was denied February 12, 1952. The effective date of the order of Division 5 of August 23, 1951, has been extended to November 1, 1952. The action in this court was filed April 9, 1952.

chester and Suffolk, Va., Wheeling, W. Va., points and places in that part of Georgia north of U. S. Highway 80, those in that part of Tennessee on and east of U. S. Highway 27, and those in Mississippi, North Carolina, and South Carolina.

Analysis of the two routes discloses that the regular and irregular routes overlap and include a part of the same territory by virtue of the fact that certain points and places in Alabama—for example, Anniston, Heflin, Oxford and Hollis School—are on the regular route, and also within the sixty-five-mile radius of Birmingham covered by the irregular route.

In the report of the Commission, Division 5, Docket No. MC-C-1132, August 23, 1951, an order was issued requiring plaintiff, Malone Freight Lines, Inc., to cease and desist from all operations in interstate commerce that involved certain unauthorized use of irregular route radial authority in violation of the Interstate Commerce Act.[5] This irregular route authorized shipment of property between two radial territories, a radial base area, hereinafter referred to as the base area, on the one hand, and a radial destination area, hereinafter referred to as the destination area, on the other. The base area included, among other things, points and places within sixty-five miles of Birmingham, Alabama. The destination area included numerous points, places and territories within eleven different states (including territory in Georgia north of U. S. Highway 80). The operation found to be unlawful consisted of transporting property between two points in the same destination area rather than between the base area and the destination area of the irregular route. For example, Malone would transfer property from Lagrange, Georgia, to New York City, New York, both origin and terminus being within the destination area of the irregular route. Such operations were performed under a claim of right as follows:

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[5] 49 U. S. C. A., Sec. 306 (a), Interstate Commerce Act, Part II, Sec. 206 (a).

Step 1. Under authority of the described irregular route from the origin, Lagrange, Georgia, a point within the destination area of the irregular route, to Hollis School, Alabama, a common point on both the regular and irregular routes.

Step 2. From Hollis School, Alabama, under authority of the described regular route to Anniston, Alabama, a common point on both the regular and irregular routes.

Step 3. From Anniston, Alabama, under the same authority used in Step 1 to New York City, New York, a place within the destination area of the irregular route.

Malone contends this operation is authorized by lawfully tacking or combining, at common points, the regular and irregular routes as shown above, by using the irregular route from Lagrange, Georgia, to Hollis School, Alabama; the regular route from Hollis School, Alabama, to Anniston, Alabama; and the irregular route from Anniston, Alabama, to New York City, New York. The Commission and interveners claim this to be a double use of the irregular radial route authority under a subterfuge of tacking or combining the regular route without actual use of the regular route.

This cause is here on review upon the charge of the plaintiff that the order of the Commission was issued arbitrarily, unlawfully and capriciously and under and by reason of a disregard of the essential and basic facts and misapplication of the law, by which action complainant is about to be deprived of property of great value without due process of law and to its irreparable damage.

An examination of the evidence upon which the order of the Commission is based reveals the fact that there is no dispute about the complex but uncontroverted facts sur-

rounding the operation by Malone Freight Lines, Inc. The manner of operation found to be unlawful was admitted. The only question to be resolved here is whether the order of the Commission is lawful that found the action of Malone to be unlawful.

There can be no question but that a motor common carrier can operate in interstate commerce only under a certificate of authority issued by the Interstate Commerce Commission,[6] or that the certificate shall specify the service to be rendered, the routes and territories where operations may be conducted, or that from time to time the Commission may add such other reasonable terms, conditions and limitations as the public convenience and necessity may require.[7] Nor is there any doubt but that the general control of motor carriers is left to the continuous supervision and regulation of the Commission[8] or that the Commission should first resolve those questions of law and fact peculiar to its own sphere of competence.

Our function does not involve a de novo construction of the certificate or a re-evaluation of the undisputed facts relating to the services being performed under the pretended warrant of its authority. We are not concerned with the weight of the evidence. The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law.[10] It is beyond our province to consider "the

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6 49 U. S. C. A., Secs. 306, 307, Interstate Commerce Act, Part II, Secs. 206, 207.

7 49 U. S. C. A., Sec. 308, Interstate Commerce Act, Part II, Sec. 208.

8 49 U. S. C. A., Sec. 304, Interstate Commerce Act, Part II, Sec. 204.

9 **Akers Motor Lines, Inc., v. Malone Freight Lines, Inc.**, 88 F. Supp. 654.

10 5 U. S. C. A., Sec. 1009, Administrative Procedure Act, June 11, 1946, as amended.

soundness of the reasoning by which its conclusions were reached." [11]

Plaintiff's primary contention throughout is that the regular and irregular routes were purchased from different companies at different times and that they may be combined, unified or tacked to perform these services lawfully. The irregular route was purchased from Howard Hall Company in 1945.[12] The regular route was purchased from North Alabama Motor Express in 1947,[13] at which time the Commission, in report MC-F-3488, decided December 19, 1947, stated in its general provisions that "in conducting regular and irregular route operations under the unified rights, Malone will be expected to preserve the separate nature of the operations and to operate within the scope of the rights by moving traffic only through authorized gateways." [14]

The Commission, by its order, recognized and permitted this unity of rights. In effect, the holding of the Commission is that the irregular route authority may be used to transport property from a point in the authorized eleven-state destination area to the base area or, specifically, to any common point or gateway of the two routes within the

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11 As stated by Mr. Justice Brandeis, **Virginia Railroad Co. v. United States**, 272 U. S. 658, 663, a rate case. It was applied to a case under Motor Carrier Act by **National Moving & Warehouse Corp. v. Interstate Commerce Commission**, 48 F. Supp. 284 (1942). See **Alton R. Co. v. United States**, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; **United States v. Carolina Carrier Corp.**, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971; **Chicago, R. I. & P. R. v. United States**, 274 U. S. 29, 47 S. Ct. 486, 71 L. Ed. 911; **Western Paper Makers' Chemical Co. v. United States**, 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941; **Interstate Commerce Commission v. Ill. Central Railroad**, 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280; **United States v. New River Co.**, 265 U. S. 533, 44 S. Ct. 610, 68 L. Ed. 1165.

12 **Malone Freight Lines, Inc.—Purchase—Howard Hall Co.**, 40 M. C. C. 161 (decided March 27, 1945).

13 **Malone Freight Lines, Inc.—Purchase—North Alabama Motor Express**, 50 M. C. C. 804 (decided December 19, 1947).

14 This general provision, in substance, may be found in **Malone Freight Lines, Inc.—Purchase—Howard Hall Co.**, 40 M. C. C. 161, 170 (1945), and again in **Malone Freight Lines, Inc.—Purchase—North Alabama Motor Express**, 50 M. C. C. 804 (1947).

base area. This exhausts the authority of the irregular route. At this common point or gateway, the two routes may be tacked, unified or combined, and the property transported under authority of the regular route to any point on the regular route. At this point both the authority for the regular route as well as the authority of the unified rights of the combined routes are exhausted.

The plaintiff contends, on the other hand, that the unified rights are not exhausted but that it may then tack, unify or combine the two routes at a second common point and use the irregular route authority for a second time in making a through-movement to any other point in the eleven-state destination area of the irregular route.

It is a well settled proposition that under the irregular route authority alone such a cross-haul between points in the same destination area is not authorized, even though the service is performed through the base area.[15] It is equally well settled that the same result may not be accomplished by tacking, unifying or combining an irregular route with a regular route co-terminus with the base area of the irregular route.[16]

The fact that two routes were acquired at different times and unified in a single certificate cannot be interpreted to mean that Malone has greater rights than if they were acquired at the same time in a single certificate. To con-

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15 **Jack Cole Co., Inc., Common Carrier Application,** 32 M. C. C. 199; **Gay's Exp., Inc., v. Haigis and Nichols,** 43 M. C. C. 277; **National Moving & Warehouse Corp. v. Interstate Commerce Commission,** 48 F. Supp. 284; **Gonez v. Interstate Commerce Commission,** 48 F. Supp. 286; **Interstate Commerce Commission v. C. & M. Motor Transfer Co., Inc.,** 64 F. Supp. 302; **Garford Trucking, Inc., v. United States,** 64 F. Supp. 780.

16 **Southwest Freight Lines v. Interstate Commerce Commission,** 184 F. 2d 149, 86 F. Supp. 587.
The order of the Commission sustained in full the recommendation of the examiner which included the finding that this identical operation by Malone was previously considered and found unlawful. This finding was made by the examiner in his report, Docket No. MC-C-1132, and repeated by the Commission in its order, 53 M. C. C. 353, 355. The previous decision referred to is **Malone Freight Lines, Inc.—Lease—Safety Transp. Corp.,** 56 M. C. C. 571 (decided May 19, 1950).

strue the unified rights of the two routes to mean that plaintiff could transport property from any point in the eleven-state destination area to any other point in that area by tacking, unifying or combining to perform service along the regular route would be "reading into its certificate an authority, not granted by the terms and provisions thereof, by custom, practice, or generally accepted interpretation of such authority as is granted in said certificate. First of all, because such a reading and contention wholly overlooks the 'service' defendant is authorized to perform under its certificate. Second, such a transportation constituted cross-hauling the 'base-point' authority granted in the certificate. And, third, defendant thereby diffuses the base point of its irregular route authority into several base points not granted in the certificate."[17]

To sustain Malone's position would be to ignore completely the concept of "service" of any kind to any common point on the regular route. It is apparent that no service to points on the regular route is performed by tacking, unifying or combining the two routes at dual common points to serve those points indirectly under authority of the regular route when they may be served directly under authority of the irregular route and when, in fact, the movement is actually made to perform service between two points in the eleven-state destination area, none of which are common to the regular route.

It is not felt that Title 49, U. S. C. A., Section 312 (Interstate Commerce Act, Part II, Section 212), providing for the revocation of a certificate, is applicable, and to apply it would be to assume the plaintiff's contention of the issue, namely, that the contested operations were authorized by the certificate and revoked by the Commission's order. The Commission's interpretation of the certificate never

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17 **Interstate Commerce Commission v. Southwest Freight Lines, 86 F. Supp. 587, 593.**

included the finding that these operations were authorized and thus it could not revoke authority that never existed.

The order of the Commission is affirmed. An appropriate order will be prepared and entered dismissing the complaint with prejudice to plaintiff.

Done, this the 13th day of October, 1952.

Richard T. Rives,
United States Circuit Judge.

C. B. Kennamer,
United States District Judge.

Seybourn H. Lynne,
United States District Judge.

APPENDIX B.

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION.

No. MC-30237 (Sub. No. 5).

LOTA H. YEATTS EXTENSION—SEVERAL STATES.

Submitted July 28, 1950. Decided November 14, 1950.

Upon further hearing, public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of cedar panels from Smyrna, Tenn., to Altavista, Va. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

W. G. Burnette for applicant.

Lucian H. Cocke, Jr., for protestants.

Glenn F. Morgan, Jr., Allen W. Staples, Thaxton Richardson and Clifton A. Woodrum, Jr., for interveners in opposition to the application.

Report of the Commission on Further Hearing.

Division 5, Commissioners Lee, Rogers and Patterson.

By Division 5:

The application has been the subject of two hearings. Exceptions were filed by applicant to the recommended

order of the examiner on further hearing and an intervener replied. Our conclusions differ somewhat from those recommended.

By application, filed February 15, 1949, as amended, Lota H. Yeatts of Altavista, Va., doing business as Yeatts Transfer Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, (1) of cedar chests from Altavista to points in Connecticut, Illinois, Indiana, Kentucky and Tennessee, (2) of locks and hardware from points in Connecticut to Altavista, (3) of glue, locks, hardware, lacquer, paints and shellac from points in New Jersey and Pennsylvania to Altavista, (4) of veneer from points in Indiana and Kentucky to Altavista, and (5) of cedar panels from points in Tennessee to Altavista, traversing Delaware, Maryland, New York, North Carolina, Ohio, South Carolina, West Virginia and the District of Columbia for operating convenience. Certain rail and motor carriers oppose the granting of the application.

Applicant has been associated with the transportation business for a number of years and is engaged principally in the hauling of cedar chests for the Lane Company, Inc., the supporting shipper herein. She is authorized to operate as a common carrier by motor vehicle, over irregular routes, (1) of shellac, paint, painting materials and glue from Newark, N. J., to Altavista, (2) of used furniture from New York, N. Y.; Philadelphia, Pa.; Baltimore, Md., and Newark, N. J., to Lynchburg, Va., and (3) of cedar chests between Altavista, on the one hand, and, on the other, points in Delaware, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, West Virginia and the District of Columbia. She owns and operates three tractors and three trailers and leases another tractor-trailer unit from her son, who is employed as her manager. All pro-

ceeds from the use of the latter unit, after deduction for operation and maintenance costs, inure to the benefit of the son. If the proposed service is authorized she anticipates purchasing two additional tractor-trailer units which would be used for handling some of the traffic in question. Applicant formerly transported the commodities described in (3) of the application for the shipper from Newark, N. J., to Altavista, but since shipper now receives these products from other points in New Jersey and Pennsylvania not embraced in applicant's present authority, she no longer enjoys this traffic. She asserts that one of the purposes of the instant application, which was filed at the request of shipper, is to obtain authority to follow the source of this traffic to new origin points. In addition, she feels that a grant of the requested authority would aid her in obtaining inbound traffic and establishing a more balanced operation.

Lane Company, Inc., of Altavista, manufactures cedar chests which it ships to a number of points in each of the considered destination States. This traffic is presently moving solely by rail except to points in Tennessee. With respect to shipments consigned to its customer in the latter State, it uses rail and intervener Falwell Fast Freight, Inc., hereafter called Falwell. It does not utilize Falwell's service for the transportation of cedar chests to points in Connecticut, because it believes that the vehicles of this carrier do not have the capacity to handle its shipments, which generally have an average minimum weight of 9,000 pounds. Falwell's service to points in Tennessee is satisfactory and shipper can recall no occasion when this carrier refused to perform any service requested of it. It has made no investigation of the availability of existing motor services from Altavista to points in Illinois, Indiana and Kentucky, because it is of the opinion that the motor carriers affording service to these points are able to provide only a joint-line

service. Although it has had no unfavorable experience in using joint-line service for the transportation of its outbound traffic, it objects to using such a service because of the possibility of delays. If the application is granted it anticipates shipping about two truckloads of cedar chests weekly to customers in each of the considered States.

Shipper's inbound movements consists of glue, hardware, lacquer, paint and shellac from Fords and Parlin, N. J., glue from Philadelphia, Pa., locks and hardware, from Lancaster, Pa., veneer from Louisville, Ky., and points in Indiana, cedar panels from Smyrna, Tenn., and hinges from New Britain, Conn. The latter item is now moving by rail and shipper asserts that a grant of the application in respect to hardware from New Britain to Altavista would fulfill its inbound transportation needs insofar as the State of Connecticut is concerned. It is afforded satisfactory service on truckload shipments from Fords, Parlin and Philadelphia, but complains of the service on less-than-truckload movements because of the transit time involved. It would be satisfied, however, with a two-day service from these points on the latter type of shipment. This traffic was formerly handled by applicant out of Newark and it desires that applicant be authorized to follow the traffic to these new sources of supply. It receives about two truckload shipments of glue a month from Fords and Philadelphia and about the same volume of finishing materials from Parlin. The latter are described as lacquers and sealers. Both are used in the manufacture of cedar chests. Its inbound movements of hardware from Lancaster average approximately three small shipments a week and, except for occasional delays at the point of interchange, it considers this service generally satisfactory. It owns and operates one truck which at times it uses for hauling veneer from points in Indiana and cedar panels from Smyrna. It knows of no motor service available from the latter point to Altavista. The serv-

ices of interveners Brooks Transportation Company and Roy Stone Transfer Corporation have been used satisfactorily in the past on inbound movements of locks from Lancaster and veneer from Indianapolis, Ind., respectively. Shipper, however, has not requested the services of these carriers for the transportation of its outbound traffic. Shipper supports the application because it feels that it requires additional single-line motor carrier service between the points under consideration.

Three motor common carriers submitted evidence in opposition to the application. Their authorities will be set forth herein only to the extent pertinent. Brooks Transportation Company, Inc., hereafter called Brooks, of Richmond, Va., is authorized to transport, over regular routes, general commodities, with exceptions, (1) between Richmond, Va., and New York, N. Y., serving all intermediate points and numerous off-route points, including those within 30 miles of Columbus Circle, New York, and those within 25 miles of Philadelphia, and (2) between Richmond and Roanoke, Va., serving the off-route point of Altavista. It operates about 100 units of equipment. It is able to render a single-line service to Altavista from Philadelphia and a joint-line service from points in Connecticut, New Jersey and Pennsylvania not on its regular routes. In the past it has transported locks and hardware for the shipper from points in Connecticut by interlining at New York City with a connecting carrier. On less-than-truckload traffic these shipments would also be interchanged at Lynchburg. It actively solicits the business of the supporting shipper and is presently hauling some of its intrastate traffic. It has received no complaints concerning its service and desires to participate in the movement of shipper's interstate traffic.

Falwell Fast Freight, Inc., hereinafter called Falwell, is authorized to transport (1) general commodities, with exceptions, from points in New York and Pennsylvania to

Altavista, (2) new furniture from Altavista to points in Tennessee, and (3) cedar chests from Altavista to points in Connecticut. Its principal terminal is located at Lynchburg, which is about twenty-five miles from Altavista. It owns and operates twenty-one tractors, twenty-one van-type trailers, one flat-bed trailer, seven gasoline trailers and seven straight trucks. It also leases three tractor-trailer units which are used exclusively for handling traffic of the supporting shipper. On occasions, when the traffic warrants, it also uses some of its own vehicles for transporting shipper's traffic. It has been serving the shipper regularly for the seven-year period immediately preceding the hearing herein and presently is hauling one or two truckloads of cedar chests in a month for it to points in Tennessee. It has received no complaints on its service. It is able to provide service on traffic moving from points in Connecticut to Altavista by interlining with a connecting carrier at New York City, and desires to transport the traffic in question to the extent of its authority. It is apprehensive that a grant of the authority sought would divert to applicant some of the traffic it is now moving for the shipper, or some of the traffic it might be requested to transport in the future.

Roy Stone Transfer Corporation of Martinsville, Va., hereinafter called Stone, is authorized to transport (1) general commodities, with exceptions, (a) between Amherst and Lynchburg, Va., on the one hand, and, on the other, points in Virginia and certain other States, and (b) between Lynchburg, on the one hand, and, on the other, points in Virginia and certain other States, (2) new furniture, between Pulaski, Va., on the one hand, and, on the other, points in Illinois, Indiana, Kentucky and Tennessee, (3) material used in the manufacture of furniture from Chicago, Ill., and points in Indiana, New Jersey and Pennsylvania to Bassett and Martinsville, Va., and (4) veneer from

Louisville to Bassett and Martinsville. It maintains a terminal at Martinsville and offices at Charleston, W. Va.; Baltimore, Md.; Philadelphia, Richmond and Rahway, N. J. It operates 55 tractors and 55 trailers. Of the latter approximately 50 percent are closed-top tandem trailers and 50 percent open-top. It is able to afford approximately 24-hour service from Altavista to Chicago, and to points in Indiana, Kentucky and Tennessee, and 16-hour service from Fords, Parlin, Philadelphia and Lancaster to Altavista. On less-than-truckload traffic moving from Indianapolis it would provide next-morning delivery to Altavista unless it had to dispatch a truck to this point from Virginia, in which event it would render third-morning delivery. In the past it has hauled veneer for the supporting shipper from points in Indiana to Altavista and has received no complaints on its service. Its last shipment of this product was during the fall of 1949. At present it is transporting only a limited amount of traffic for shipper between undisclosed points. It is able to handle additional traffic and is anxious to obtain additional business within the scope of its certificate.

The examiner recommended that applicant be granted authority for the transportation of hinges from New Britain to Altavista and of cedar panels from Smyrna to Altavista, and that the application be denied in all other respects. In his recommended denial of a substantial portion of the application the examiner appears to have placed considerable emphasis upon the availability of the service of intervener Stone, finding, in effect, that Stone has authority to transport cedar chests from Altavista to points in Indiana, Illinois, Kentucky and Tennessee and veneer from Louisville and points in Indiana to Altavista. Applicant takes vigorous exception to the finding of the examiner in this respect and denies that Stone has the authority claimed. Stone's claim of right to be able to transport the cedar chests and

veneer from and to the points indicated is based upon its claimed right to combine separate grants of operating authority. For convenience and clarity we shall confine our discussion herein to the claimed right to transport the cedar chests.

Stone's certificate contains three separate grants of authority as follows: (1) New furniture between Pulaski, on the one hand, and, on the other, points in Illinois, Indiana, Kentucky and Tennessee; (2) general commodities, with certain exceptions, between Amherst and Lynchburg, on the one hand, and, on the other, points in Virginia, North Carolina, South Carolina, West Virginia, Maryland and the District of Columbia; and (3) general commodities, with certain exceptions, between Lynchburg, on the one hand, and, on the other, Washington, D. C., and points in Virginia and North Carolina. The authority described in (2) above was obtained by purchase from Abram Jerome Novick of Winchester, Va., and that described in (3) was obtained by purchase from H. M. Turner Trucking Corporation of Martinsville. Under Stone's theory it would transport cedar chests from Altavista to Lynchburg under the authority described in (2), thence from Lynchburg to Pulaski under the authority described in (3), and thence from Pulaski to points in Indiana, Illinois, Kentucky and Tennessee under the authority described in (1), thus providing a through movement from Altavista to a point such as Indianapolis, through Lynchburg and Pulaski. Applicant argues, however, that when Stone acquired the rights of Novick and Turner the duplication in authority for the transportation of general commodities to and from Lynchburg was automatically eliminated, and that after the consummation of the respective purchases Stone became possessed of only a single inseparable operating right, which will permit transportation between Lynchburg, on the one hand, and, on the other, either Altavista or Pulaski, but

which will not permit service from Altavista to Pulaski through Lynchburg.

The purchase by Stone of the operating rights of Novick and Turner was approved in **Roy Stone Transfer Corporation—Purchase—Abram Novick and H. M. Turner Trucking Corporation**, 39 M. C. C. 834. In approving the acquisitions, Division 4, after noting the publications, authorized such rights to be unified with those otherwise confirmed in Stone **with duplications eliminated**. A consolidated certificate was issued to Stone on February 3, 1945, but the operating rights obtained from Novick and Turner were separatey described, as indicated in (2) and (3) above, and such separate descriptions have been carried forward in subsequent consolidated certificates issued to Stone. It is well settled that when two or more operating authorities are acquired by one person, duplicating grants of authority merge and become a single right. This is so even though the duplicating rights are not physically combined in the certificate or permit later issued to the purchaser. Compare **Southwestern Transp. Co.—Purchase—Johnson**, 35 M. C. C. 437. Thus, upon the consummation of the purchase by Stone of the separate rights theretofore confirmed in Novick and Turner, such rights became unified into a single ownership and operation, with all duplications eliminated. The question is then presented as to whether the resulting unified right to operate between Lynchburg, on the one hand, and points in Virginia, on the other, will permit Stone to operate from Altavista to Pulaski, through Lynchburg.

Ordinarily, a grant of authority to conduct a radial operation between a base point, such as Lynchburg, on the one hand, and points in a territory, such as Virginia, on the other, will confine the original grantee to operation to and from Lynchburg only. In other words, the service to be performed as to any particular shipment must either begin or end at Lynchburg. Compare **Gay's Exp., Inc., v. Haigis**

and Nichols, 43 M. C. C. 277. A somewhat different situation is here presented. Stone is not the original grantee and the unified right to operate between Lynchburg and points in Virginia is a consolidation of two separate rights formerly held by two separate carrier entities. Any unification of common-carrier rights creates the same, but no greater, rights than the two carriers might themselves have created by interchange prior to the unification. Prior to unification Novick could have transported cedar chests from Altavista to Lynchburg and interchanged the shipment at that point with Turner for transportation from Lynchburg to Pulaski. Since Novick and Turner could have performed a coordinated service from Altavista to Pulaski through Lynchburg, Stone, as purchaser of the separate rights, may perform a similar service. The unified right which Stone acquired by purchase must be as great as the separate rights of Novick and Turner, otherwise the unification will have resulted in a forfeiture, with Stone receiving something less than that which Novick and Turner sold. In the circumstances, we conclude that the unified right now held by Stone for the transportation of general commodities, with exceptions, between Lynchburg and points in Virginia will permit it to transport cedar chests from Altavista to Pulaski, through Lynchburg, and that such right may be joined at Pulaski with other rights held so as to permit the transportation of cedar chests from Altavista to points in Indiana, Illinois, Kentucky and Tennessee, through Lynchburg and Pulaski. Similarly, it may transport veneer from Louisville and points in Indiana to Altavista, through Martinsville and Lynchburg.

As seen, only a single shipper appeared in support of the application and it professed a need for service only between certain of the points involved therein. An analysis of the evidence shows that this shipper has failed to establish a real need for the proposed operation except for the

transportation of cedar panels from Smyrna to Altavista. Either it knows of the existence of authorized motor carriers affording service in the considered territory and has not requested service therefrom, or it has made no investigation to ascertain whether there are such services available. It does not contend that the services of the existing carriers which it is now using are unsatisfactory, except as to less-than-truckload shipments from Parlin, Fords and Philadelphia. In this connection it is significant to note that on this latter traffic it asserts that a two-day service would be satisfactory. The record manifests that interveners Stone and Falwell collectively are authorized to transport the commodities described in (1), (2), (3) and (4) of the application between the points that shipper now has occasion to require service. Stone is able to provide a 16-hour service from the New Jersey and Pennsylvania points mentioned above to Altavista. In addition, the evidence discloses that there are several other motor carriers able to serve a part of the affected territory. The services of three of the carriers opposing the application are admittedly satisfactory. Although shipper objects to a two-line service it has had no unfavorable experience in using such a service. There is no reason to believe that the joint-line services of Falwell and Brooks from points in Connecticut to Altavista would not be satisfactory or that the service which applicant proposes would be, in any material degree, superior to the services of these carriers. Brooks formerly served the shipper on traffic moving from points in Connecticut to Altavista and received no complaint on its service. While it would undoubtedly be of some convenience to shipper to have applicant's proposed service available, this, in itself, does not prove a public need. We have repeatedly held that existing carriers are entitled to transport all traffic which they can handle adequately, economically, and efficiently without the competition of a new carrier. The record, however, reveals that shipper is with-

out adequate motor service for the transportation of cedar panels from Smyrna to Altavista and, to this extent, a grant of the authority sought is warranted.

Applicant also raises the "follow the traffic" issue in respect of the transportation of the commodities described in (3) of the application. She argues that the shipper formerly received these products from Newark, but that the source of supply has changed to other points in New Jersey and Pennsylvania, namely, Parlin, Fords, and Philadelphia, and that applicant should be authorized to "follow this traffic" to these new origin points. We do not agree with this contention. We have found in previous cases that where the importance of an authorized origin point diminished and a carrier, through no fault of its own, faced the possibility of losing a large percentage of its former business, it should be allowed to serve the new origin. See **Petroleum Transp. Co. Extension of Operations—Umatilla**, 19 M. C. C. 637. However, in **Empire Express, Inc., Extension—New Brunswick, N. J.**, 47 M. C. C. 727, which involved a motor carrier of general commodities seeking authority to transport storage batteries from new sources of supply, we elaborated on the principle, stating:

> Shippers and consignees frequently shift their sources of supply for particular commodities, but evidence of such a shift alone does not warrant a grant of authority to a motor carrier allowing it to follow the traffic. Where existing motor-carrier facilities are adequate, a carrier engaged in transporting general commodities from and to specified origins and destinations is not entitled to authority to extend its operations to new origins and destinations with every change in the flow of its customers' traffic, in the absence of a showing that the service performed has peculiar characteristics or that the loss of the traffic involved would have a substantial effect upon the

carrier's revenues and its ability adequately to serve the public in the performance of its over-all operation.

We are convinced that these qualifications are equally applicable here. There has been no showing that this traffic comprises a large percentage of applicant's total business, that it is of such a peculiar nature that authorized motor carriers would be precluded from handling it, or that existing motor carrier services are inadequate. In fact, the contrary is true. Applicant admits that she is engaged principally in the hauling of cedar chests, and the shipper states that the motor carrier presently hauling this traffic is rendering satisfactory service, except as to less-than-truckload shipments. In regard to this latter traffic, as previously seen, Stone is able to provide a faster service than the shipper requires. Accordingly, we conclude that the "follow the traffic" principle is not applicable herein.

Applicant is fit and able, financially and otherwise, properly to perform the operation authorized herein.

Upon further hearing, we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of cedar panels, from Smyrna, Tenn., to Altavista, Va., over irregular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted; and that in all other respects the application should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and with our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

ORDER.

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 14th day of November, A. D. 1950.

No. MC-30237 (Sub-No. 5),

Lota H. Yeatts Extension—Several States.

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

By the Commission, division 5.

(Seal)

W. P. Bartel,
Secretary.